Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

the jury in criminal trials

Working Paper 27

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of Canada

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THE JURY
IN
CRIMINAL TRIALS

1980

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Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Foreword

The subject of this Working Paper is the jury in criminal proceedings. Trial by jury is a fundamental institution, a veritable "rock of ages", in our system of criminal justice in Canada. The Law Reform Commission concludes that there is good reason — historic, political, intellectual and pragmatic — to retain the jury system with but few substantial changes.

In terms of criminal proceedings, however, the jury like several other Canadian legal institutions and subjects, evinces and survives a constitutional fissure. That is to say, the holding of a criminal trial by a court composed of judge and jury in Canada invokes the legislative jurisdiction both of Parliament and of the provincial legislatures. To Parliament, section 91 of *The British North America Act* extends exclusive legislative authority to all matters coming within the following class of subject:

> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

According to section 92 of the same Act, in each province the Legislature may exclusively make laws in relation to matters coming within the following class of subject:

> 14. The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, . . . of Criminal Jurisdiction . . .

At what point the administration of justice, including the constitution, maintenance and organization of a court of

criminal jurisdiction composed of a judge and jury leaves off, to be replaced by the procedure in criminal matters, may sometimes be difficult to divine. Yet, some aspects of constituting, maintaining and organizing a court composed of a judge and jury seem clear. For example, designating the lists or sectors of the population from whom prospective jurors are summoned, and fixing and paying remuneration for jury service are surely matters of provincial jurisdiction. Once the court composed of a judge and jury is constituted and organized, determining the order in which counsel and the judge shall address the jury, and designating what materials the jury may take into their deliberations are clearly incidents of the procedure in criminal matters.

The Commission is, however, well aware that, in treating the jury as an integrated subject, there are several of the recommendations in this Working Paper which cross over the line into provincial jurisdiction. Some of the changes suggested may be in matters in which both the Parliament of Canada and the provincial legislatures have jurisdiction to legislate. At this time, however, there is no constitutional conflict of competing jurisdictions largely because Parliament has, by section 554 of the *Criminal Code*, expressed itself to be content with juror qualifications according to the laws in force for the time being in the provinces.

Confronted with the interesting task of dealing with the jury in criminal proceedings as an integrity, and not wishing to blunder insensitively into matters of provincial jurisdiction, we have kept in mind the 1975 and 1976 Proceedings of the Uniform Law Conference of Canada in regard to this subject. The amendments which we respectively adopt and tentatively recommend, then, are intended to provide for uniformity across Canada wherever possible. They are intended to maintain the integrity of the jury system, in criminal proceedings despite its constitutional fissure.

I

Introduction

In a trial by jury, twelve people are chosen at random to decide the fate of a fellow human being. They are placed in an unfamiliar setting and required to observe solemnly the unfolding of a real life human drama. They deliberate in secret. They return a verdict for which they are not required to give reasons. They then fade anonymously back into their everyday lives. It is little wonder that the jury has been described as "an exciting experiment in the conduct of serious human affairs".[1]

For centuries lawyers, judges, scholars and others have debated the merits, and more recently the essential characteristics, of this "exciting experiment". Indeed of all our institutions of government, it perhaps evokes the greatest passion. It has been the subject of the most extravagant praise and the most vitriolic criticism.[2] The famous English jurist, Sir William Blackstone, called the jury "the glory of English law" and claimed that trial by jury is "the most transcendent privilege which any subject can enjoy".[3] Lord Camden asserted that, "Trial by jury is indeed the foundation of our free constitution; take that away, and the whole fabric will soon smoulder into dust".[4] On the other hand, it has been said that the jury system ". . . puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it was good a thousand years ago".[5] Hermann Mannheim, an eminent criminologist, noted of trial by jury that "almost its only consoling feature is the thoroughness of its decline".[6]

We are satisfied that the institution of the jury performs a number of valuable functions in the criminal justice system. Our views on the value of the jury are shared by the Canadian public, trial judges across the country and jurors themselves.

In April, 1977, we commissioned the Canadian Institute of Public Opinion, the organization which conducts the Gallup public opinion polls in Canada, to conduct a survey of the public relating to the jury.[7] General public support for the jury system can be inferred from the responses to this survey questionnaire.

We also sent a survey questionnaire to Canadian trial judges to obtain their views on the criminal jury.[8] While many judges felt that particular aspects of jury trial could be improved (many of these suggestions are embodied in our recommendations) their overall view of the jury was very favourable.

Our third survey, a survey of Canadian jurors,[9] revealed that the strongest supporters of the jury system are those who are perhaps in the best position to assess its merits — the jurors themselves. A favourable overall view of the jury system was held by 96 per cent of the jurors responding to our survey.

We concluded from our study that the jury system should be retained. We also concluded that the present major characteristics of the jury should be retained; namely, that it should continue to be composed of twelve people and it should continue to be required to reach its verdict by a unanimous vote. However, in this working paper we have recommended numerous changes in our system of jury trial which, we think, would substantially improve it. For example, in the chapter on "Jury Selection", we recommend broadening the categories of people who are liable for jury service and recommend changing the procedure of jury selection so that juries will more nearly represent a random cross-section of the community. The personal well-being of jurors seems at times to be neglected under the present practices. In the chapter on "Preliminary Matters", we recommend increased protection of the

jurors' employment, a system to ensure that jury duty is not a financial hardship for jurors, and a more effective orientation program for jurors so that they can discharge their responsibilities fully informed and without anxieties about the unfamiliarity of the process. In the chapter "Judge's Charge to the Jury", we recommend changes, such as the use of specially prepared guidelines in explaining the law to the jury, which should ensure that the jury adequately understands the facts of the case and the law to be applied to the facts. Our recommendations relating to "Special Procedures during Trial", such as permitting jurors to take notes during the trial, should facilitate the jurors' understanding of the case and perhaps minimize the discomfort of the unfamiliar surroundings. Similarly, our recommendations in the chapters on "Jury Deliberations" and "Jury Verdicts", relating to such matters as the materials the jury may take into the juryroom to assist them in their deliberations, the procedure for reviewing the evidence if the jury requests it, jury secrecy, polling the jury and impeaching the jury's verdict, while they cannot be described as far-reaching or major, should render the law in this area more uniform and certain, and should ensure that the jury is not unnecessarily hampered in discharging its responsibilities.

At least two significant matters relating to jury trial are not covered in this working paper. First, we have not dealt with the general question of the classification of offences. Clearly criteria should be developed to distinguish between those offences for which a jury trial should be mandatory, those for which it should be discretionary and those for which it should be prohibited. The present classification of offences does not appear to reflect the consistent application of any underlying principles. However, the classification of offences involves considerations other than whether the particular offence should be tried by jury, such as the extent of pre-trial discovery and trial procedure, and therefore such a study must be a culmination of our work on criminal law and procedure.

Another area relating to the jury and not dealt with in this report is jury system management: the operation of the jury pool, jury panel size, summoning jurors, juror comfort and the

procedure for exercising challenges. Undoubtedly, improving the usage of the jurors' time is important to the effective operation of the jury system; however, since the most effective means of dealing with the day-to-day administrative matters relating to the jury is likely to vary from district to district, and certainly involves a matter about which lawyers have little or no expertise, it seemed appropriate to leave a study of this aspect of the jury system to some other body more directly accountable to jury clerks and court administrators.

To assist us in evaluating the present practices relating to trial by jury, we undertook a number of empirical studies, including the surveys mentioned above. Our present perception about the jury in Canada consists almost entirely of folklore, common sense and anecdotal experience. These studies were modest in design and were not intended to provide us with definitive answers to the difficult issues relating to the jury. However, they were very helpful to us in formulating our recommendations. These studies will be published in one volume, a Study Paper, titled "The Jury", of which limited distribution will be accorded to federal and provincial justice ministries and law reform bodies in Canada. It will be available from our library on an inter-library loan basis.

II

Functions of the Jury

What purposes are served by having twelve untrained persons determine the guilt or innocence of the accused in a criminal trial? Obviously, any study on jury reform must begin with an articulation of the functions of the jury. Once what is expected of the jury is clarified, a judgment can be made about how well the jury is fulfilling its role, and about the changes necessary in our present rules and practices to ensure that it achieves its functions as nearly as possible.

Given the long and rich history of the jury, its significance in our criminal justice system, and the fact that so many jurists regard trial by jury as a fundamental right, a definitive answer to the question of what are the jury's functions is surprisingly elusive. In this chapter we review, however, the major functions which can be assigned to the jury. We think that the jury's discharge of these functions justifies its retention. The recommendations for changes which we make in the remainder of this working paper should, if implemented, further assist the jury to discharge these functions.

A. The Jury as Fact-Finder

In a trial by jury, after all the evidence has been presented, the judge instructs the jury on the relevant legal doctrine. The jury then retires to deliberate. It determines the relevant facts and applies the law to them in reaching its verdict. Thus, whatever other functions are assigned to the

jury, it is clearly assumed to be capable of making an accurate determination of the facts. Indeed, some commentators allege that the most compelling justification for retention of the jury is that it is a better fact-finder than the judge. For example, Lord du Parcq has asserted that "when questions of fact have to be decided, there is no tribunal to equal a jury".[10] Lord Halsbury said: "As a rule, juries are in my opinion, more generally right than judges."[11] It has even been contended that the jury was "adapted to the investigation of truth beyond any other [system] the world can produce".[12]

Several characteristics of the jury account for its fact-finding ability. First, a jury brings to bear on its decision a diversity of experiences. The evaluation of practically every item of evidence involves making judgments about human behaviour: the likelihood that the witness could have perceived and remembered what he or she relates to the court, the likelihood that in the circumstances of the case the witness is being sincere, the possible motivations of the parties, their character, habits, and their responses to a wide range of circumstances. By and large, the trier of fact must make these judgments on the basis of his or her personal experiences. The collective experience of the jury, it can be argued, representing a spectrum of society, provides a much better basis for making these kinds of judgments than the experiences of a judge alone.

Second because the jury deliberates as a group, it has the advantage of collective recall. Different items of evidence will have a different impact on each juror. What was insignificant and forgotten by one juror, will be significant to another, and will be remembered. Thus during the jury's deliberations it is likely that all relevant facts and their significance will be considered by the jury.

Third, the jury's deliberative process contributes to better fact-finding because each detail is explored and subjected to conscious scrutiny by the group. In this context a group decision-making process is generally more satisfactory than that of a single person because it must be oral and audible without any issues being only mentally, and therefore silently, taken for granted.

Because the jury's deliberations cannot be recorded and because there is generally no way of determining the accuracy of the jury's verdict, it is very difficult to test directly the competence of the jury. A few studies have been undertaken, however, which at least indirectly shed some light on the jury's fact-finding ability.

A most thorough and ambitious empirical study on the jury is *The American Jury* by Harry Kalven and Hans Zeisel.[13] This book represents the culmination of years of careful study of the jury undertaken under the auspices of the University of Chicago Jury Project. The research reported in the book was not designed as a study of the competence of the jury; the purpose of the study was to find an answer to the question, "When do trial-by-judge and trial-by-jury lead to divergent results?" The information collected for the study, however, permitted the authors to draw a conclusion about the jury's competence. Indeed, based on inferences they drew from their data, the authors concluded that the results of their study were "a stunning refutation of the hypothesis that the jury does not understand the case".[14]

Further support for the proposition that lay persons can understand and evaluate litigious evidence comes from experiments using simulated juries. For example, one experimenter used mock juries in order to test empirically the relationship between judicial instructions on insanity and jury verdicts.[15] She showed videotaped trials to the mock juries and recorded their deliberations. Although it was an incidental aspect of her study, a review of the recorded jury deliberations led her to the conclusion that even in fairly complex cases involving expert evidence, the juror understands and evaluates the testimony. She found that, "The jurors [in their deliberations] relied very heavily on the record. They reviewed every piece of evidence presented during the trial. . ."[16] It is probably fair to conclude that if juries who have no responsibility for the ultimate disposition of a real case thoroughly review and evaluate the evidence, it is likely that real juries do the same.

The view that jurors are competent fact-finders is shared by the vast majority of Canadian judges. In our survey of

judges, 92 per cent felt that juries generally understood the evidence.

While the replies of jurors who took part in our survey of jurors to questions about how difficult the case was and whether they understood it naturally only provides us with their perceptions of these matters, it is clear that the jurors in our sample thought they understood the presentation of the evidence. The evidence was found easy to understand by 90 per cent of the jurors, while 88 per cent felt that juries generally are able to understand and evaluate the evidence.

Finally, we might note that the general educational level of jurors has been rising dramatically. Our survey of jurors revealed that 60 per cent of jurors had a grade 11 or better education. Only 4 per cent had grade 6 or less.

B. The Jury as the Conscience of the Community

Two important purposes of the law sometimes conflict. On the one hand, the application of the law must be certain in order to permit people to plan their affairs on the basis of it and to deter them from engaging in activity which it proscribes. Thus, the law must be stated in general terms so that it clearly applies to a wide variety of situations. On the other hand, the law must apply in individual cases in a manner that ensures that disputes are resolved equitably. While in the vast majority of cases a general rule of law, founded upon proper policy, will lead to the equitable resolution of individual disputes, it might not do so in all cases. Since all factual situations cannot be foreseen in formulating general rules of law, invariably cases will arise in which a rigid application of the law will lead to an inequitable result. In criminal law this dilemma is recognized to some extent by providing the prosecutor with a limited discretion to decide what offences with which to charge the accused or, in some instances, to decide whether or not to proceed with the case. Furthermore, judges are able to reconcile these interests in some individual cases by granting the accused an absolute or conditional discharge.

Many jurists argue, however, that in serious cases it is the jury who must retain the ultimate responsibility for dispensing equity.

Whether the jury should be retained in order to fulfill this function can be determined only after we have the answers to two questions. The first is a pragmatic question: what evidence is there that the jury exercises its equitable jurisdiction in a way which conforms to shared notions of community fairness? The second question involves essentially a value judgment: whether the value of flexibility which the jury injects into the application of the law outweighs the danger that this kind of *ad hoc* decision-making will lead to uncertainty and unequal treatment before the law?

Supporters of the jury contend that it departs from a strict application of the law in those cases in which, because of the particular facts of the case, a strict application would lead to an unjust result. On the other hand, detractors of the jury argue that the jury, when it departs from a strict application of the law, does so largely on the basis of emotional responses and personal prejudices. This issue can be resolved only when we know exactly what extra-legal factors the jury considers in reaching its verdict. The studies done to date, while far from conclusive, do suggest, however, that in the majority of cases in which the jury appears to depart from a strict application of the law, it does so because it is bringing to bear on the decision broad community sentiments of fairness.

The strongest support for the argument that the jury in reaching its verdict considers matters of equity comes from the University of Chicago Jury Project, as reported in *The American Jury*. The authors of that study, by comparing the verdicts of juries with the verdict the judge presiding at the trial would have given, found that in 25 per cent of the cases the jury gave a different verdict than the judge would have given. In the vast majority of the cases, the jury acquitted when the judge would have convicted. Based upon a questionnaire completed by judges presiding at the trials, the authors postulated that the reasons the jury acquits when the judge would have convicted included: the accused in the case

was subject to some unfairness, such as being the only one charged in a situation where many were clearly guilty or being badly mistreated by the police; the accused had already suffered a great deal as a result of the commission of the crime; the degree of moral blameworthiness of the accused was small because the victim contributed to the commission of the crime or because the accused was acting totally out of character; and the harm the accused occasioned in the commission of the offence was trivial. The authors of the study concluded that the jury's "revolt" from the law was a minor one, but that it played an important role in "correcting" the law in cases where a strict application would lead to an unjust result.[17] They also noted that the modifications that the jury makes in the law are slight and in most cases too subtle to be codified.[18] Many other experimental studies tend to support the conclusion that in most cases the jury appears to bring to bear on its decision a sense of justice shared by the larger community.[19]

Thus, while it would be impossible to quantify the extent to which jury verdicts reflect the jurors' sense of equity as opposed to their prejudices, practical studies, as well as the anecdotal experience of many lawyers and judges, tend to suggest that when the jury deviates from a strict application of the law it most often does so in a manner consistent with shared community notions of equity. There is, of course, no way in which the value of this flexible application of the law can be carefully weighed against the danger that it introduces uncertainty and unequal treatment (to the extent that some accused are tried by juries and some are not and to the extent that different juries might decide a case differently) into the law. However, we think that on the evidence we have before us a case can be made for retaining the jury on the ground that it ensures, to some extent, the just resolution of individual cases.

The results of our survey of the Canadian public suggest that the majority of Canadians view the jury as a means of bringing community values to bear on judicial decisions.

Also in our survey of Canadian judges we asked trial judges to rank the features of jury trials in order of their

importance. The response "The jury is a good way of infusing community values into a trial", received second highest ranking.

C. The Jury as the Citizen's Ultimate Protection Against Oppressive Laws and the Oppressive Enforcement of the Law

The function of the jury discussed above involved the jury in ignoring the strict application of the law in order to bring to bear on the criminal process community notions of fairness. That function of the jury arises from the impossibility of drafting general statements of the law which will lead to equitable results in all cases. The function of the jury discussed here also involves the jury in ignoring the strict application of the law. The reason, however, is slightly different, namely, that the law sought to be applied does not conform to the common morality of the community, or is being used by the State in an oppressive fashion. Whereas the former function of the jury might be justified by a theory of the judicial process, this function views the jury primarily as a political institution.

The jury has perhaps been most eloquently and vociferously defended as the champion or palladium of liberty and as the citizens' ultimate protection against arbitrary law enforcement and oppression by the Government. The sentiments of Sir Patrick Devlin are typical of those who defend the jury on this ground:

> Every 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. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.[20]

This view of the function of the jury has, of course, its detractors. Glanville Williams has written:

> The assumption that political liberty at the present day depends upon the institution of the jury, though still repeated by English lawyers in addresses to foreign visitors, is in truth merely folklore — of a piece with the theory that English liberty depends on the separation of powers, or (as opinion at one time had it) upon the absence of an organised police force.[21]

Whether historically the jury was perceived as having the right to nullify the law has been the subject of much debate.[22] However, since 1670, when it was held in *Bushnell's Case*[23] that the jury could not be punished for acquitting the accused even though the judge might feel that the jury's decision was not in accord with the law, it is clear that the jury has had the power to nullify the law. Even though the jury is instructed to apply the law as explained to them by the judge to the facts as they find them, they deliberate in secrecy, they return only a general verdict, and their decision cannot be reversed by a judge.[24] When they return a verdict of acquittal, it is never known whether they found facts consistent with the accused's innocence, or entertained a reasonable doubt as to guilt, or simply refused to apply the law.

Should the jury be retained because it has the power to acquit if it concludes that the law being applied is immoral or oppressive even if the law and evidence would appear to justify a guilty verdict?

We think that a case can be made for retaining the jury because of its ability to nullify what it regards as oppressive laws. Even though the number of cases in which the jury acts as a check upon arbitrary government or the arbitrary enforcement of the law is small, the protection is an important one and is applied in cases of great public importance. As well, the publicity attendant upon a jury acquittal in the face of an oppressive act of the state is itself a deterrent to arbitrary conduct on the part of state officials. The resulting publicity alerts the public to possible abuses of power. It is also symbolic of the fact that centralized government power must be exercised in a way which is ultimately responsive to the community's needs and values.

Concern is sometimes expressed that the jury's power to nullify the law will lead to a number of dangers: that twelve people will be able to frustrate the wishes of the representatives of the majority; that the jury may not appreciate the societal significance of the law they are asked to apply; that the law will not be applied uniformly across the country; and that the exercise of such power will lead to unequal treatment before the law as some accused persons are acquitted by a particular jury while others are convicted of the same crime committed under similar circumstances by another jury. Experience, however, has shown that these dangers are not serious. In the great majority of cases the jury obviously applies the law. And in the rare case where it, in effect, nullifies the law, the social good caused by such a "revolt against the law" outweighs whatever dangers may arise.

D. The Jury as an Educative Institution

Jury service requires the public to participate directly in an important governmental process. This has a number of significant consequences: it informs people about the workings of the criminal justice system; it educates them about the aims of the penal system and the values of procedural due process; it engenders a sense of efficacy among the public by permitting them directly to influence the implementation of the criminal law and to do so on an equal basis with everyone else; it reaffirms the duties each individual owes to society; it compels judges and lawyers to proceed in a manner understandable to lay persons; and, by permitting people to view and participate in the system firsthand, the jury decreases the mystique of the criminal justice system and increases its acceptability.

How well does jury service perform those educative functions? Is the jury worth retaining for this purpose? This is a rather difficult question upon which to obtain direct evidence. However, the results of the questionnaire surveys we conducted, permit at least a probable inference to be drawn that jury service does perform a valuable educative function.

First, it is worth noting that a substantial number of people have either served on a jury or know someone who has. It appears from our survey of the public that in Canada 5 per cent of the adult population has served on a jury in a criminal trial. An additional 29 per cent of the population knows at least one other person who has been on a jury. Assuming that jurors relate their experience to at least some of those with whom they come in contact, one could conclude that about a third of the population has had some direct or indirect contact with the criminal jury.

Our survey of jurors also revealed that serving on a jury resulted in people acquiring a generally more favourable attitude toward aspects of the criminal justice system. Compared with people prior to serving, people after serving were slightly less likely to believe that a person could be wrongfully convicted by a jury; slightly more likely to feel that a jury is more likely to arrive at a fair and just verdict than a judge; and slightly more likely to believe that the courts are fair. Two observations should be made about these results. First, since jurors were overwhelmingly positive in their ratings of the overall jury system even before serving, the increase in their positive attitudes after serving is only slight. Second, those persons who were called for jury duty, but who did not actually serve on a jury during their term of jury duty, tended to be slightly less favourably disposed, overall, towards jury duty. (As we describe later in this working paper, this finding points up the necessity of attempting to reduce the inconvenience of jury duty to those who are summoned but who do not actually serve on a jury.)

The argument is sometimes made that whatever value jury service is to those who serve, they are still likely to have a negative impression of the experience because it is such an inconvenience to most people. Our survey revealed, however, that only a small percentage of jurors found jury service to be an inconvenience. It was found to be a great inconvenience by 5 per cent, and somewhat inconvenient by 23 per cent, but 73 per cent reported that it was only a slight inconvenience or no inconvenience at all. Our recommendations, if implemented, should further reduce the inconvenience and tribulations of jury service.

Finally, it is interesting to note that trial judges, who might be expected to have from experience a good sense of the effect of jury service on those who have served, in ranking the positive features of jury trial, ranked first the fact that the jury "involves the public in the work of the criminal justice system and serves to educate them."

E. The Jury's Role in Legitimizing the Criminal Justice System

Many commentators suggest that there is a relationship between the jury system and the public's acceptance of legal decisions as fair, proper and just. For example, Lord John Russell has asserted, "It is to trial by jury . . . that the Government mainly owes the attachment of the people to the laws — a consideration which ought to make our legislators very cautious how they tamper with the mode of trial by new trifling and vexatious enactments."[25] Sir James Stephen wrote, ". . . trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It is difficult to over-estimate the importance of this. It gives a degree of power and of popularity to the administration of justice which could hardly be derived from any other source."[26]

Public acceptance or legitimacy is undoubtedly an overriding value of the criminal justice system. A number of explanations might be suggested as to why the jury induces confidence in the administration of justice. These explanations are in large part derived from the other functions the jury is thought to serve in society. That is to say, jury verdicts might be seen as more acceptable than the decisions of trial judges sitting alone because the jury is perceived as being a better fact-finder than the judge or because it is seen as being more likely to reach a just conclusion. However, whether jury verdicts are in fact more acceptable to the public than decisions by judges alone would be very difficult to determine.

Our survey of the public revealed, however, that more people felt that a jury is more likely to arrive at a just and fair

verdict than is a judge. Only 9 per cent felt a judge is more likely to arrive at a just and fair verdict, while 37 per cent felt that a jury is more likely to arrive at a just and fair verdict (54 per cent rated them both equally). Thus in this regard four times as many people favour the jury as favour the judge. As well, almost all Canadians, based on our survey, think that accused people should be given the option of trial by jury for at least some offences and about a third of the people went so far as to suggest that the accused should have the option of trial by jury for all criminal offences.

F. Other Functions of the Jury

Each of the functions discussed above would appear to provide a strong reason for retaining the jury. But as well as these, there are other positive features of jury trials which, while perhaps not in themselves sufficient reason to retain the jury, cumulatively constitute a strong case in the jury's favour.

First, to some extent the jury relieves the judge of the heavy responsibility of deciding the question of guilt or innocence in difficult and important cases. Second, the jury protects the court by deflecting the criticism that the public might make of judges in individual cases and thus "acts as a sort of lightning rod for animosity and suspicion which otherwise might centre on the more permanent judge."[27] Third, the jury tackles each case afresh; therefore it is able to avoid the biases and predispositions which judges must surely acquire after hearing hundreds of similar cases. As Justice Fortas has explained, "I think the major reason we cling to the jury system is because judges do become case-burdened. Judges do sometimes tend, after many years, to take a somewhat jaundiced view of defendants."[28] Fourth, in cases in which important evidence must be excluded because it infringes a rule of evidence, the evidence will usually be excluded in the jury's absence and thus their decision will be untainted by its existence. In a trial by judge alone the judge must, in most

instances, hear the evidence before he rules whether it is admissible. Having heard the evidence, for example that the accused has a previous record, he might be influenced by it in reaching his decision even though he rules it is inadmissible. Finally, consistent with our prevalent theory of government, the jury disperses and decentralizes authority.

III

Characteristics of the Jury

A. The Unanimity Requirement

Recommendation 1

The requirement that the jury be unanimous before it renders a verdict should continue to be an essential characteristic of the jury.

COMMENT

One of the most characteristic features of the criminal jury in Canada is the requirement that all jurors must be unanimous before a verdict can be returned. If, after a reasonable period of deliberation, the jurors are unable to agree on a verdict — either of conviction or acquittal — a hung jury results. A mistrial is declared in such a case, and the charges must be dropped or the accused retried.

The requirement of jury unanimity has an ancient history. As early as 1367, a recorded case noted that unanimity was a necessity.[29] The historical reasons for the rule are obscure. Explanations range from the theory that it developed to compensate for the lack of other rules ensuring that a defendant received a fair trial to the theory that it arose out of the

medieval concept of consent, which implied unanimity.[30] Given the changed role of the jury, however, the original reasons for the rule are irrelevant in any debate of its merits in a contemporary legal system.

Despite its ancient roots, the unanimity requirement has come under scrutiny, particularly in recent years, and in many jurisdictions has been abandoned. Pressures for change have been generated by concern that one or two obstinate or corrupt jurors may prevent guilty persons from being convicted; that hung juries cause intolerable delays and expense in the administration of criminal justice; that 'unanimous' verdicts are often compromise verdicts; and that the unanimity requirement makes jury decision-making anomalous in a society which generally proceeds by some form of majority vote.

In 1967, England enacted legislation permitting a jury in a criminal proceeding to return a majority verdict of 10:2 or 11:1. The only prerequisite is that the jury must first deliberate and attempt to reach a unanimous verdict for at least two hours or such longer period as the court thinks reasonable having regard to the nature and complexity of the case.[31]

In 1972, the United States Supreme Court in two five-to-four decisions[32] upheld the constitutionality of non-unanimous jury verdicts in state criminal trials (9:3 decisions in Louisiana for certain crimes, and 10:2 decisions in Oregon for crimes other than first degree murder.)

Juries can return non-unanimous verdicts in specified cases in at least six states in the United States,[33] four states in Australia,[34] and in other such Commonwealth countries as England, Scotland,[35] and Trinidad and Tobago.[36] In most of these jurisdictions, the change from unanimity was made apparently with little prior study. In England, for example, the introduction of majority verdicts sparked a heated debate in both Houses of Parliament, the popular press and the legal literature.[37] Those opposing the change argued that there was "no evidence on which to base a change"; that the House

would be taking "a leap in the dark"; that there was "no proof that the unanimity rule needed altering"; and that "the Home Secretary has not made out the case". "What is the mischief?" asked Lord Denning. Several members of the House of Commons quoted with approval the statement of Sir Patrick Devlin that "it is wise not to tamper with it [the unanimity principle] until the need for alteration is shown to be overwhelming".[38]

In the United States, the Supreme Court decisions holding non-unanimous verdicts constitutional in state criminal cases provoked immediate controversy. Social scientists, in particular, joined in the debate. Many took issue with the assumptions upon which the Court had rested its decision.

In the preparation of this working paper we commissioned two empirical studies and undertook a number of surveys relating to the question of whether we should retain the unanimity requirement. These studies have been collected and published in one volume, a Study Paper, "The Jury". Here we shall briefly review the arguments for and against the unanimity requirement, and the reasons upon which we recommend its retention.

Arguments in Favour of Majority Verdicts

1. The Problem of the Hung Jury

Majority verdicts will result in fewer hung juries than unanimous verdicts and will therefore save the time and expense of retrials.

How serious is the hung jury problem in Canada? In our survey of judges, only 8 per cent of the judges felt that hung juries were a serious problem. The statistical evidence would tend to bear out the impressionistic hunch of the great majority of Canadian judges that in terms of numbers, hung juries are not a problem, let alone a serious problem. Hung juries rarely occur in Canada. Certainly, by no stretch of the

imagination do they occur frequently enough to pose a serious economic problem to the system.

In 1970, juries disagreed about the guilt or innocence of only about 1.1 per cent of the persons who were tried by trial by jury (the trials of 14 persons resulted in a hung jury). In 1971, this percentage dropped to .7 (8 persons) and in 1972 to .4 per cent (5 persons).[39] The persons involved represented respectively, .027, .015 and .009 per cent of the persons charged with an indictable offence in those years. Thus, in 1972 only .009 per cent of the persons charged with an indictable offence had to be retried because of a hung jury.

Statistics Canada has not yet published the figures for the disposition of jury cases for more recent years. Therefore, to get more recent statistics on the number of hung juries, this Commission requested the relevant statistics from the Chief Justice of each province for the period September 1976 to September 1977. The responses were as follows:

	Total Jury Trials	*Hung Juries*
Newfoundland	10	0
Nova Scotia	64	1
New Brunswick	78	2
Quebec	339	2
Ontario	326	4
Manitoba	44	0
Saskatchewan	95	3
Alberta	83	2
British Columbia	331	—
TOTAL	1370	14

Thus, in 1976-77, only 1.02 per cent of the jury cases resulted in a hung jury.

These figures might be compared to the figures from the United States where it appears that about 5 to 5.5 per cent of jury cases result in a hung jury,[40] and in England where, before the recent change to majority verdicts, about 3.5 to 4 per cent of the cases which went to the jury resulted in disagreement.[41]

Not only is the number of cases in Canada in which there is jury disagreement negligible, but relaxing the unanimity requirement would not eliminate hung juries. The University of Chicago Jury Project found that those states that allowed majority verdicts had only about 45 per cent fewer hung juries than those that required unanimity.[42] In states where a unanimous verdict was required, a hung jury occurred in 5.6 per cent of jury cases. Where a majority verdict was permitted a hung jury occurred in 3.1 per cent of the cases. Adopting a rule for less than unanimous verdicts in Canada would mean that there would be a need in 1972, for example, to retry only .1 per cent of all persons who elect trial by jury instead of about .3 per cent. Thus, a saving of only .2 per cent fewer jury trials would result. Even this figure overstates the savings since prosecutors do not retry all cases in which there has been a hung jury.

It seems clear that abolishing the unanimity requirement will do little to relieve the work load of the criminal courts and the cost of maintaining the criminal justice system. Compared to other potential cost-saving changes and considering the benefits of the unanimity requirement, which will be discussed below, this economic argument becomes inconsequential. The *Report of the Morris Committee on Jury Service*[43] considered that jury disagreements were inevitable if jurors were performing their task conscientiously. And the Committee concluded that "this need cause no concern, unless disagreements occur so frequently as to indicate that the orderly administration of justice is being prejudiced".[44] No evidence exists that this point has been reached in Canada.

Also, in deciding whether the present number of hung juries is a problem we should not forget that the right of one or two jurors to hang a jury is an extremely important one because of the protection it affords to minorities and because of its symbolic value with respect to the worth of the individual. As expressed by an American judge:

> . . . as history reminds us, a succession of juries may legitimately fail to agree until, at long last, the prosecution gives up. But such juries, perhaps more courageous than any other, have performed their useful,

vital functions in our system. This is the kind of independence which should be encouraged. It is in this independence that liberty is assured.[21]

2. The Problem of the Corrupt Juror

Even if hung juries occur infrequently they are an unnecessary expense and also pose the threat of releasing guilty persons since it is usually one or two unreasonable or corrupt individuals who hold out and hang a jury that would otherwise have reached a verdict.

Both the premise and the soundness of this argument can be questioned. The argument assumes that hung juries are caused by one or two obstinate or corrupt jurors. Overwhelming evidence suggests this is not the case. In England, where the abolition of unanimous verdicts was opposed vigorously, time and time again members of the House of Commons asked for evidence that the problem of the corrupt juror was serious, but none was forthcoming. It appears that the government was responding to one or two highly publicized trials in which attempts to interfere with jurors was alleged. Subsequent research revealed that the evidence of nobbling (intimidating jurors) was "infinitesimal".[46]

There is no compelling evidence in Canada from actual reported cases to support the fear that corrupt or obstinate jurors pose a serious threat to the criminal justice system. Indeed, an analysis of the kinds of cases in which hung juries occur reveals that they involve a wide range of offences. They are in no way concentrated in those cases in which jury intimidation might be a strong likelihood.[47]

Two lines of data collected by the University of Chicago Jury Project also tend to confirm that the corrupt juror is not a problem. First, in over 200 hung jury cases, not once did the trial judge suggest that there was anything suspicious about the jury deadlock.[48] Second, in no case in which only one, two or three jurors voted for not guilty on the first ballot did the jury fail to reach agreement. In almost every case in which the

jury was hung there was a minority of four or five at the beginning of the deliberations. The following table shows the first ballot votes and final outcomes of 155 juries for which the researchers were able to obtain this information:[49]

Per Cent of Deadlocked Juries as Related to their First Ballot

First Ballot		Per Cent of Juries which:	
Guilty	Not Guilty	Reached a Verdict	Disagreed
11	1	100	—
10	2	100	—
9	3	100	—
8	4		
7	5		
6	6	85	15
5	7		
4	8		
3	9	93	7
2	10		
1	11	100	—

These statistics show that jury deadlock results only where a substantial minority viewpoint is prevalent on the first polling of the jury. Consequently, the most likely explanation for jury deadlock is not one or two stubborn, unreasonable, prejudiced or corrupt jurors, but rather "if one may take the first ballot vote as a measure of the ambiguity of the case, then it follows that the case itself must be the primary cause of a hung jury".[50] The authors of the University of Chicago Jury Project conclude by saying, "Hence in the absence of direct and specific evidence of scandal, there is nothing in the hung jury phenomenon, even when a small minority finally deadlocks the jury, which compels, or is even compatible with the view that hung juries are caused by a lone corrupt juror holding out against the objective weight of the evidence".[51]

Even if the assumption that hung juries are frequently caused by a corrupt juror were true, the argument that unanimous verdicts should therefore be abandoned is unsound. It is unsound because the more sensible way to deal with such a

problem is the careful screening of jurors, and the vigilant pursuit of any allegations of interference with jurors. In our review of the jury selection process, we will make recommendations which should ensure the opportunity of eliminating the eccentric or prejudiced individual from jury service. In another part of the paper, the problem of jury tampering will be discussed. Furthermore, it must be remembered that a corrupt juror who hangs a jury does not secure the acquittal of the accused. The worst he can do is create a disagreement and put the state to the expense of a new trial.

3. Unanimous Verdicts are Anomalous

A third argument often made in support of majority verdicts is that the requirement of unanimity is inconsistent with, or at least anomalous when compared with decision-making rules for other democratic institutions. Legislative bodies, appellate courts, administrative tribunals and practically every other body in which group decisions must be made, decide on the basis of some form of majority vote. Why not jury verdicts?

Generalizing by analogy is always potentially dangerous. The fallacy inherent in such a form of argumentation is that two things will be made to appear more similar than they really are. That fallacy is present in this argument for majority jury verdicts. Except for the fact that they are all illustrations of group decision-making in a democratic society, jury decision-making bears no resemblance to the other group decision-making processes mentioned in the analogy. Certainly, they do not share sufficient similarities to lead us to conclude that they should be modified to conform in all respects. Numerous differences are obvious: (1) An accused is not convicted unless the jury is satisfied of his guilt beyond a reasonable doubt (for an argument as to the relationship between this burden of proof and the unanimity requirement, see below); (2) The jury has very little time within which to reach a decision, and the only information upon which they can rely is that presented to them; (3) Individual jurors are unskilled in evaluating litigious evidence, it is the juror's collective

experience and the deliberative process which result in accurate fact-finding; (4) Jurors must determine essentially factual questions, while most other tribunals also deal with questions of law and policy or both.

4. The Unanimity Rule is a Sham

The unanimity rule is a sham. While receiving the apparent concurrence of all jurors, many verdicts in fact represent either a compromise among the jurors, or a verdict in which a minority acquiesced because of coalition or verbal pressure.

The argument that the unanimity rule ought to be abandoned because it is a sham has two aspects. First, it has been argued that some verdicts are compromises in the sense that the jurors agreed to a result after a period of "negotiation" so that the final verdict did not represent the most satisfactory verdict to any, or at most to only a few of them. However, this aspect of the argument does not lead inexorably or even logically to the conclusion that we should have majority verdicts. For one thing, compromise verdicts may not be an undesirable way to resolve cases. At least it is not clear that they are less just than a verdict reached by a majority that did not have to compromise. Indeed, many people argue that the jury's strength is the fact that its verdict is the result of the interaction of twelve individuals. Furthermore, abandoning the requirement for unanimous verdicts would not necessarily eliminate this problem. A compromise verdict might be returned in slightly fewer cases, but compromise might still be necessary in order to obtain a verdict of ten or whatever number the majority requirement might be.

The second aspect of this argument is that the unanimity rule is a sham because in many cases a minority of jurors consent to the verdict in order simply to end the deliberations or because they have yielded to coalition or verbal pressure. Intuitively, one suspects that this must occur in some cases. Again, however, the inference that the unanimity requirement should be abandoned does not necessarily follow from this

argument. All of the arguments given below which support the unanimity requirement retain their validity even though some verdicts may not reflect true unanimity. It is on the basis of a careful weighing of the benefits of unanimity against the costs that a decision for its retention or abandonment must be made. If the unanimity requirement has important benefits, the fact that it sometimes leads individual jurors to acquiesce in a decision which they might not support would not appear to be a serious cost. Indeed, this phenomenon would also be present in majority verdicts.

Arguments in Favour of Unanimity

The most fundamental rule of criminal procedure is that the accused can be found guilty only if a trier of fact is convinced of his guilt beyond a reasonable doubt. Many people argue that the unanimity requirement is necessary to preserve the integrity of this basic concept. Sir James Stephen propounded the argument in the following way:

> . . .[n]o one is to be convicted of a crime, unless his guilt is proved beyond reasonable doubt. How can it be alleged that this condition has been fulfilled, so long as some of the judges, by whom the matter to be determined, do in fact doubt.[52]

The concept of proof beyond a reasonable doubt performs at least two functions in the criminal justice system. First, it eliminates to the greatest possible extent the chance that an innocent person will be convicted because of an error in the evaluation of the evidence. Second, it ensures the moral acceptability of convictions because the public is not left in doubt as to whether innocent persons are being convicted. The unanimity requirement would appear to further both of these goals.

1. Increased Accuracy of Fact-Finding

The unanimity requirement reduces the risk that innocent people will be convicted by increasing the accuracy of jury fact-finding.

The risk that an innocent person might be convicted could of course be reduced by having 100 people on the jury or by eliminating all trials. The unanimity requirement, however, decreases this risk, not by imposing an unreasonable limitation on conviction, but by increasing the accuracy of the jury's fact-finding.

A jury is assumed to be an accurate fact-finder because it brings to bear on the decision-making process the collective experience and recall of twelve persons, and because the deliberative process in which they engage encourages a give-and-take by which ideas and arguments are tested, refined, confirmed or rejected. The unanimity requirement would appear to be necessary to ensure that these attributes of jury decision-making are present. Empirical research relating to the jury's deliberative process suggests: first, that minority views are more likely to be expressed and considered under the unanimity rule; and second, that the quality of discussion is superior. From these findings, the greater likelihood of an accurate decision under the unanimity rule can be inferred.

2. More Acceptable Verdicts

The unanimity rule leads to verdicts which are more acceptable than majority verdicts

The maxim, "justice must not only be done but must be seen to be done", embodies an ultimate value in the criminal justice system. Indeed, the public acceptance of and confidence in jury verdicts is an important reason for retaining juries. In this context, then, it must be asked: which are likely to be more acceptable, unanimous or majority verdicts? There is no dearth of unsupported speculation on this topic. Sir Patrick Devlin, for example, stated: "The sense of satisfaction, obtainable from complete unanimity, is itself a valuable thing".[53]

The appearance of justice is important from the point of view of the jurors (if jury duty is to have the desired educative effect); the public (if the criminal trial is to continue to be a

morally acceptable method of reinforcing value judgments); and the accused (if rehabilitation is to be possible).

The best data available on this general question relate to the perception of jurors about the two kinds of decision-making rules. The two studies which have sought an answer to this question have found that jurors under the unanimity requirement were more satisfied with the way the decision was made,[54] and were more likely to perceive that justice had been administered.[55]

Our survey of Canadian jurors also suggests that jurors, based on their experience, prefer the unanimity requirement. For example, before serving on the jury, the members of the jury panel were fairly evenly split on the question of unanimity. It was felt by 40.5 per cent that "it would be a good idea to allow less than unanimous verdicts", while 38.5 per cent felt it would not. However, after serving there was a shift toward wanting to maintain the unanimity requirement. While 40.4 per cent still felt it would be a good idea to allow less than unanimous verdicts, about 10 per cent of those who were undecided before serving, were convinced after serving that it would not be a good idea to allow less than unanimous verdicts, thus raising the percentage of jurors who held this view to 48.6 per cent.

The issue of whether the unanimity rule is essential in order to maintain public confidence in the jury system is more difficult to resolve. However, one cannot help but feel that the unanimity requirement, like the proof-beyond-a-reasonable-doubt standard, has an important symbolic value in informing people that the State has taken all possible safeguards to ensure that innocent persons are not convicted. In an effort to obtain some empirical data about the public's awareness of and opinion about the unanimity rule, two questions relating to this issue were included in our opinion poll of the Canadian public.

If few people knew about the unanimity rule, then the argument that it is an essential characteristic of the jury and is required to maintain public confidence in the system would be

hard to sustain. However, 75 per cent of people across the country answered "yes" to the question "Before finding an accused person guilty of a criminal offence in Canada, must all 12 people on the jury agree that he is guilty?" Given the general lack of public awareness about the exact workings of the criminal justice system, this is an impressive percentage of respondents.

Another question asked was whether people felt that the jury should be unanimous before convicting the accused. A list of possible answers were given, including "for all criminal offences" and "for no criminal offences". Approximately one-third of the respondents (33.1 per cent) thought that the jury should be unanimous for all criminal offences, while very few people (3.7 per cent) opposed unanimity for all criminal cases. For serious offences (*e.g.*, murder) as many as 90 per cent of the respondents felt the jury should have to be unanimous. This percentage declined with the seriousness of the offence until, for impaired driving, for example, only 40 per cent of the respondents felt that a jury (if the offence were tried by jury) should have to be unanimous. Thus it appears that for offences presently tried by a jury the great majority of Canadians are in favour of unanimous verdicts.

Finally, what would be the effect of the majority rule on accused's perception of the criminal justice system? Again, although there is no data, one cannot help but think that the accused would be more willing to accept the verdict, and less likely to attempt to rationalize his conviction, if he knew that the jurors had to be unanimous in their findings. Indeed, introducing majority verdicts would result in three kinds of verdicts: acquittal, conviction by a majority, and conviction by a unanimous jury. This concern was emphasized by many judges who corresponded with us on this issue. For example, an Ontario judge claims that "Psychologically, it would be disastrous for an accused to know he was found guilty by simple majority vote." Expanding on this, a judge from British Columbia says that, "There would remain in the accused's mind after his trial the thought that the minority believed in his innocence and he would be dissatisfied with the system."

Another important way in which the unanimity requirement would appear to contribute to the moral acceptability of jury verdicts is by ensuring that the jury discharges its function of bringing community standards to bear on the decision-making process. So that the jury performs this function, jury selection procedures are structured to ensure that minority groups are not excluded from jury service. Yet, it is possible that it will be the views held by these minorities that will be ignored if the jury can reach its verdict on the basis of a majority vote. The effect of such a rule would be to make our commitment to the possibility of a representative jury a hollow promise.

B. Jury Size

Recommendation 2

The jury should continue to be composed of twelve jurors (except in the Northwest Territories and the Yukon).

COMMENT

The criminal jury in Canada and England has traditionally had twelve members.[56] But why twelve? Why not eight or six or even four? Surprisingly, there has been little pressure to diminish the size of the jury in Canada. Indeed, the only recent change in a Canadian jurisdiction has been to increase jury size. In Alberta, in 1969, the number of jurors was increased from six to twelve.[57] This change was apparently made on the grounds that, "if it is necessary to have a 12 man jury in Ontario, then it is necessary to have a 12 man jury in Alberta".[58] However, as trial delay becomes a matter of increasing concern, and as the costs of the criminal justice system are perceived as becoming

increasingly burdensome, other common law jurisdictions have frequently seen a reduction in the size of the jury as an essential step towards savings and efficiency.

History affords little insight into the question of whether the number of jurors should remain at twelve. However, here, as with the unanimity requirement, the apparently haphazard, trial and error development of the jury may have led to a jury size that embodies more wisdom than after-the-fact explanations would suggest. The jury survived because its size was reduced to a number which was workable and manageable and, at the same time, permitted it to discharge its functions. The question, therefore, is whether the evolving functions of the jury, increased knowledge about the psychology of small groups, or new administrative or economic needs justify a reduction in jury size.

We concluded that the jury should continue to be composed of twelve members. There has been virtually no pressure for change in Canada and those who would reduce the jury size from twelve to six have failed to prove that this would increase the effectiveness or efficiency of jury trials.

Smaller juries would not significantly reduce the cost or increase the administrative efficiency of the jury system. In the provinces that provide a separate breakdown of jury expenditures, under one per cent of the administration of justice budget goes to fund juries. Maintaining a twelve-member jury does not, therefore, appear to impose an undue financial burden on the provinces. In Alberta in 1967-1968, 3.83 per cent of the justice budget was spent on juries, interpreters and witnesses. In 1974-75, after twelve-member juries were introduced, this figure rose to 4.62 per cent. Thus, the increase in the number of jurors resulted in a .79 per cent maximum increase in the cost of the administration of justice. It is likely that not all of this increase was attributable to the change in the jury system because there may also have been an increase in the number of witnesses and interpreters and in the rates of pay received by jurors, witnesses, and interpreters during the same period of time. Also, of course, the number of jury trials might have increased.

It is sometimes asserted that society at large bears a cost associated with large juries since each juror who sits to hear a case is taken out of productive economic activity. However, this argument uses "productive" in a very narrow sense in that it assumes that jury service is not "productive". Furthermore, whatever diminution in gross national product is caused by having twelve-member juries rather than six, it is difficult to imagine, admittedly without empirical data, that the loss would be anything but trivial.

A variation of this argument emphasizes the hardships, financial and otherwise, suffered by jurors and makes the obvious point that these hardships would be reduced in the aggregate by reducing the size of the jury. This view rests on an incorrect assumption and ignores one of the jury's most important functions. This view, in any event, is of no consequence to any individual juror.

Admittedly, an inordinately lengthy trial such as the recent dredging conspiracy case cannot be ignored. It was exceptional, in that the jury served for fourteen months. Remarkably, at least one of the jurors indicated, in an interview published in *The Globe and Mail* of Monday, May 7, 1979 (page 5), that the experience actually strengthened his faith in the institution of trial by jury.

The incorrect assumption is that jury service imposes hardships on those who serve. Our survey of jurors revealed that very few of them found jury service a hardship, financial or otherwise. Only 5 per cent of jurors found performing jury duty a great inconvenience and 73 per cent found it was no inconvenience whatsoever or only a slight inconvenience. The jury fee was described as at least adequate by 38 per cent of the respondents, small by 44 per cent, and outrageously small by 19 per cent. While these figures do not indicate that jury service imposes an undue hardship on those who serve, under our forthcoming proposals, particularly those relating to jury compensation and length of jury service, jury service should become even much less of an inconvenience for those who serve.

The function of the jury which is ignored by this argument for reducing jury size is that of educating people about the criminal justice system and increasing public confidence in it. Our survey of the Canadian public indicated that approximately one-third of the adult population have learned about how the judicial system works through the jury. About 5 per cent of the adult population have served on a jury in a criminal trial, and an additional 29 per cent know at least one person who has been on a jury and they, therefore, might be expected to have had their attitudes towards the criminal justice system affected by the experiences of the juror. This survey also revealed that persons who have served on a jury were more likely to be in favour of the jury. Thus, if the jury were reduced to six members, it would affect fewer people and it would be less successful in educating the public and increasing confidence in the criminal justice system.

Even if it could be shown that the cost of twelve-member juries is greater than the cost of six-member juries, the benefits of twelve-member juries far outweigh those costs. Verdicts of twelve-member juries are more likely to reflect the opinion of a representative cross-section of community since a random selection of twelve people will lead to a more representative group than a random selection of six people. Again, the views of minorities are more likely to be represented on a twelve-member jury.

Furthermore, a twelve-member jury is more likely to lead to accurate fact-finding than a six-member jury. There is some evidence to suggest that first, a twelve-member jury will be more productive than a six-member jury since there will be a higher probability that someone in the jury will remember essential pieces of information; also the jury have available a wider range of experience and judgment with which to evaluate evidence and correct errors. Second, a twelve-member jury is less likely to be influenced by an "oddball" juror than a six-member jury. Third, members of twelve-member juries are likely to have more robust and searching discussions and to explore more factual issues than six-member juries.

The above considerations put the twelve-member jury into comparison with the six-member jury. "More" is not infinitely better than "fewer" of course, because it seems obvious that a jury more numerous than twelve or, say fifteen, could be cumbersome. The twelve-member jury evinces familiar feasibility from which there is no good reason to depart.

IV

Jury Selection

Introduction

The functions assigned to the jury presuppose that jurors are selected at random from a fair cross-section of the community and that they are impartial between the State and the accused. Thus the process by which jurors are selected is vitally important. But as well as achieving these overriding goals, the procedure by which jurors are selected must ensure that jurors are competent, that undue hardships are not imposed upon individuals, that the participants' time is used efficiently, that cases are adjudicated on their merits, and that the accused is able to perceive that he or she has been tried fairly and impartially.

The present law and practice in Canada appear to come close to achieving these ideals. Our survey of jurors indicates that jurors generally thought that the selection process was fair.

Thus no drastic revision of the jury selection process would appear to be called for. It can, however, be improved in numerous particulars. Because of the need for certainty and uniformity in the area we have cast our recommendations in the form of a Model Jury Selection Act. In many instances our recommendations simply reflect the present law, in others they have been drawn from the Report of the Manitoba Commissioners on Jurors (Qualifications, Disqualifications and Exemptions) to the Uniform Law Conference of Canada

(1974-75); the Manitoba Law Reform Commission, Report on the Administration of Justice in Manitoba: Part II A Review of the Jury System; and the *United States Uniform Jury Selection and Service Act* drafted by the National Conference of Commissioners on Uniform State Laws. As well, a paper on Jury Selection which states the present law in each province is contained in our Background Studies on the Jury. Therefore only a brief comment follows each proposed section.

Recommendation 3

PART I — JURY SERVICE

Section 1. ***Qualification for Jury Service***

(1) Every person is qualified and liable to serve as a juror in a criminal proceeding unless specifically disqualified in subsection 1(2).

(2) A prospective juror is disqualified to serve on a jury if he or she:

(*a*) is not a citizen of Canada, at least eighteen years old, and not ordinarily resident in the judicial district in which the proceeding is held;

(*b*) is unable to speak and understand either French or English, subject to the accused's right, exercisable not later than arraignment, to be tried by a jury composed entirely of jurors who speak and understand the language of the accused, if that language is English or French;

(*c*) is by reason of his or her blindness or deafness or a physical or mental infirmity incapable of discharging the duties of a juror;

(*d*) (i) has been in prison or other detention on conviction for an indictable offence, without option of a

fine, within the five previous years, unless sooner pardoned; or

(ii) is charged with an indictable offence;

(*e*) is engaged in the administration of justice or the enforcement of the law and, without restricting the generality of the foregoing:

(i) is an officer or employee of the Department of Justice or Solicitor General's Department of Canada, or of the Attorney-General's Department of the Province;

(ii) is an officer of any court, including a sheriff, a deputy sheriff, a sheriff's officer, a constable or a bailiff;

(iii) is a judge, magistrate or justice of the peace;

(iv) is a police officer or police constable;

(v) is a warden, correctional officer or person employed in a penitentiary, prison or correctional institution;

(vi) is a barrister, or solicitor, or student-at-law;

(vii) is a coroner;

(*f*) is the spouse of any person mentioned in paragraph (*e*);

(*g*) is a member or officer of the Privy Council, or of the Senate, or of the House of Commons of Canada;

(*h*) is a member or officer of the Executive Council or of the Legislative Assembly of the Province.

COMMENT

If a representative jury is to be empanelled, the categories of people who are disqualified from jury service must be kept at a minimum. Thus subsection 1(1) makes it clear that jury service is a duty of all citizens. The exceptions to the general rule that everyone is qualified and liable to serve on a jury are limited.

Citizenship

Jurors must be familiar with the experiences and standards of conduct of the average member of the community and they must feel a commitment to the community. Citizenship is a logical requirement for qualifying for jury duty. Consideration was given to providing that landed immigrants qualified for jury duty, however, citizenship is recommended as a qualifying factor because, while it provides only a rough indication of the above characteristics, it at least draws a line capable of objective application. Furthermore, a landed immigrant can apply for citizenship after only three years in the country and thus the requirement of citizenship will not likely result in the disqualification of any unique minority viewpoint. Finally, non-citizens are not included on the voters' list and thus could not easily be placed on the jury list. Some provincial statutes provide that British subjects qualify as jurors. This appears to be an anachronism. In this day and age, in terms of the necessary characteristics of a juror, there would appear to be no reason to distinguish a British subject from citizens of any one of a number of other Western countries. Acquiring citizenship demonstrates a commitment to Canada which ought to be the first qualification to participate as a juror in the important functions of a court of criminal jurisdiction anywhere in Canada.

Age

An age qualification of 18 years accords with the minimum requirement for jury duty in most provinces.

However, since it is proposed that jury lists be compiled from provincial election lists, persons younger than the provincial voting age could not be included on the jury lists without considerable added expense. Because 18 years is now generally accepted for most purposes as the age of majority, we recommend that age as the norm. As for the elderly, it is asserted that they should not be disqualified merely because they exceed a certain age. Those who are 65 or over will be able to apply for an exemption from jury service as of right pursuant to the next section.

Ordinary Resident

The requirement that a juror be ordinarily resident in the judicial district in which the proceeding is held is really one of convenience, both for the prospective juror and for the court in assembling jurors; although it also ensures that the jurors will be familiar with local customs and standards of conduct. In the section, "ordinarily resident" will presumably be given the same meaning as it has in section 17 of the *Canada Elections Act*.

Language Fluency

The only test of education, intelligence or literacy persons must pass to qualify as a juror is that they speak and understand one of the official languages. Any other test of intelligence or education would lead to invidious distinctions being drawn. Even literacy is not required since the evidence that jurors are asked to evaluate is in most cases almost exclusively oral.

This subsection also provides that if the language of the accused is English or French, he or she has a right to be tried by a jury fluent in his or her language. This right we regard as fundamental in a bilingual country.

These recommendations we express to be in addition to all existing law and practice which accord to an accused

person or a witness the services of an interpreter whenever the accused or witness cannot understand or speak the official language in which the proceedings are conducted.

Physical or Mental Disability

This disqualification is self-evident.

Convicted Persons

This disqualification is a compromise between the position in several provinces which disqualify only persons sentenced to imprisonment and the position in such provinces where a person "charged" with a criminal offence is disqualified. Summary convictions were excluded from the disqualification because, by and large, such offences are less serious. These would include Crown option offences where the Crown elected to proceed by way of summary conviction. *e.g.*, possession of marijuana, impaired driving, theft under $200. The persons disqualified under the proposed section are those who are most likely to be biased against the police and who, if they were allowed to serve, would be most likely to cause the public to lose confidence in the verdict of the jury.

We did not adopt here the wording expressed in the similar provision of the Uniform Jurors Act (Qualifications and Exemptions) recommended by the Uniform Law Conference of Canada in 1976, because the provision which we do recommend appears to be more precise and more easily applied.

Occupational Disqualifications

Three grounds are commonly put forward for excluding people in certain occupations from serving on juries. First, certain persons should be excluded by reason of their position, and the knowledge gained therefrom, because they might be able to exert undue influence on other jurors (lawyers and judges). Second, certain persons should be excluded because

they would appear, to the public at least, to have an occupational bias towards guilt or innocence (law enforcement personnel). Third, certain persons should be excluded because they perform vital services in society and it would be wasteful to have their time taken up sitting on a jury. The first two grounds for disqualifying persons from serving on the jury are valid and are reflected in the enumeration of persons who are disqualified. With respect to the third ground, however, it is doubted whether any person, other than legislators and Cabinet Ministers, occupies such a strategic position in society that he or she should be automatically exempt from assuming the responsibilities of jury service. Therefore this ground has not been used as a justification for disqualifying persons from serving on the jury. To the extent that it is a hardship for people to serve on the jury or to the extent that some people have an important and immediate public function to perform, they will be able to apply for an exemption from jury service under the following section.

We do agree with, and seek public response to the Uniform Law Conference's recommendation about the disqualification of spouses of persons mentioned in paragraph (*e*) of our draft.

It is doubtful that any such law could ever be perfectly devised to eliminate bias or the apprehension of bias from juries, but it is surely better than the absence of such a provision. Its adoption would implicitly permit the judge's informal questioning of prospective jurors about their occupation and status if the same were not otherwise disclosed.

(Recommendation 3)

Section 2. ***Exemptions from Jury Service***

(1) Prospective jurors may be exempt from serving on a jury if:

(*a*) they adhere to a religion or religious order which renders service as a juror incompatible with the beliefs or practices of the religion or order;

(*b*) serving as a juror will cause them serious hardships or loss to themselves or to others who are immediately relying on them;

(*c*) their serving as a juror would cause their employers exceptional hardship;

(*d*) serving as a juror would be contrary to the public interest because they perform essential and urgent services of public importance which cannot reasonably be rescheduled or cannot reasonably be performed by another and which are not ordinarily performed by another during their absence on vacation;

(*e*) they were called for jury duty at any time in the five preceding years;

(*f*) they are 65 years of age or over.

(2) The court, upon request of a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other evidence whether the prospective juror should be excused from jury service.

(3) A person who is excused from jury service pursuant to paragraphs 2(1)(*b*), (*c*) or (*d*) shall have his or her name placed on the jury panel for the following year.

COMMENT

The provisions for exemption from jury service proceed on the same assumption as the provisions for disqualifications, namely, that jurors should be selected randomly from a wide cross-section of the community. Thus, specific excuses for exemption from jury service have been kept at a minimum. In order to be relieved from jury service, a prospective juror must show some overriding reason. The provisions are drafted in general terms since local conditions will very much govern which persons should be excused. Obvious examples of

persons who would fall within paragraph 2(1)(*b*) and (*d*) are single parents, persons recovering from a severe illness and farmers at certain periods of the year. Paragraph 2(1)(*c*) is suggested because some legislatures may consider it appropriate to enact provisions which would make employers responsible for continuing the wages of employees who serve on a jury. This paragraph serves simply to identify a consideration which may generate legislation in some provinces.

Subsections 2(2) and (3) make it clear that persons excused from jury duty are not thereby disqualified. An application for an excuse from jury service will be included as part of the juror qualification form. The questionnaire must be returned within seven days of receipt of the jury summons. Thus, the sheriff or the judge will be able to deal with many requests for exemption simply on the basis of the returned questionnaire and supporting documentation. If on the basis of a written request in the questionnaire the sheriff or the judge is in doubt as to whether an exemption should be granted, the judge presiding at the opening of the term can examine the juror in person. The prospective juror should be notified by mail that the request for an exemption can be renewed at that time. See subsection 5(5).

(Recommendation 3)

PART II — OUT-OF-COURT SELECTION OF JURORS

Section 3. *Preparation of Jury List*

(1) In September of each year the sheriff shall prepare a list of all persons eligible for jury duty, called the jury list.

(2) The jury list shall include at least all persons on the most recent lists of electors prepared pursuant to the [provincial] ***Elections Act*** **for those divisions that contain the names of people residing in the relevant judicial district.**

(3) Any person who qualifies for jury service, but whose name does not appear on the list of electors described in subsection (2), may have his or her name added to the jury list.

(4) No person's name shall appear more than once on the jury list.

COMMENT

At present the method of compiling the list of prospective jurors varies from province to province. This is regarded as being a matter within provincial jurisdiction. This section provides that the basic list of jurors will come from the voters' list compiled for the last provincial election. By way of illustration, it may be noted that under section 14 of the *Canada Elections Act* generally every person 18 years of age or over and a Canadian citizen is eligible to vote and will be included on the list of electors. These requirements coincide with the jury qualification rules which we have recommended in section 1. Persons who are disqualified from voting in a federal election will generally also be ineligible for jury duty, *e.g.*, inmates of a penal institution. Similar matters in provincial law would have to be sensibly adapted for jury service. One possible problem is that the lists of electors for a riding or ridings may not correspond with the boundaries of the relevant judicial district. However, since the list of electors is itself compiled from much smaller lists prepared by enumerators for polling divisions it should not be too difficult to compile lists of electors in a manner roughly corresponding with boundaries of the judicial district. This sort of problem is best identified and solved within each province.

The list of electors will tend to get out of date between general elections. Accordingly subsection 3(2) provides that the list may be supplemented by other lists such as those prepared for municipal elections and provincial by-elections, if that is practicable. Subsection 3(3) provides that a qualified person whose name does not appear on the list may have his or her name added. Other means of identifying qualified pros-

pective jurors, such as medicare rolls, may be utilized in one province or another. These matters appear to come under the rubric of the administration of justice in each province.

(Recommendation 3)

Section 4. ***Selection of Jury Panels***

From time to time as required in the ensuing twelve months, the sheriff shall select at random from the jury list the names of as many persons as may be required for jury service and they shall constitute the jury panel.

COMMENT

It is now generally accepted that any method of selecting jurors other than randomly is unacceptable. The exact method of random selection will vary from judicial district to judicial district. Some will undoubtedly find the use of a computer to be the most convenient.

(Recommendation 3)

Section 5. ***Summoning of Jury Panels***

(1) The sheriff shall summon every person whose name is selected from the jury list by sending him or her by registered mail, or by personal service, a summons in prescribed form, at least fifteen days before the day upon which the person is to attend.

(2) The sheriff shall include with the summons a prescribed juror qualification form.

(3) Every person to whom a juror qualification form is mailed in accordance with this section shall accurately and truthfully complete the questionnaire and shall mail it to the sheriff within seven days after receipt thereof.

(4) The sheriff, after examining the completed questionnaire, shall remove from the jury panel those who are not qualified to serve on a jury and all persons who are excused from serving on a jury and such persons shall be notified in writing that they do not need to obey the summons.

(5) A person who has made application to be excused from jury service and whose application has been dismissed shall be notified in writing in prescribed form that he or she must attend on the date set out in the summons but that he or she may then renew his or her application in person.

(6) A judge may abridge any times prescribed by this section.

(7) Everyone who wilfully and without lawful excuse fails to comply with subsection (3) is guilty of an offence punishable on summary conviction.

COMMENT

This section provides a simple procedure for selecting and summoning jury panels. Each person selected from the jury list will be sent a summons to appear for jury duty along with a juror qualification form. The juror qualification form will require the person served to answer a few specific questions so that the sheriff may determine whether the person is qualified to serve on a jury, and so that the person may at this early stage make known any grounds he or she might have for being excused from jury service. If the sheriff is satisfied on the basis of the person's answers on the juror qualification form that the person is not qualified to serve on a jury, that person will be notified that he or she does not have to obey the summons. A similar notice will be sent to a person who is excused from jury service.

(Recommendation 3)

Section 6. *Availability of Juror Qualification Forms*

(1) The accused and the prosecutor are entitled to receive upon payment of any charges that are fixed by the sheriff, at least two weeks prior to the day set for the commencement of the trial of the accused or at least two weeks prior to the commencement of the sittings of the court, as the case may be, a copy of the jury panel and a copy of the jury qualification form completed by each person on the jury panel who has not been disqualified or excused from jury service.

(2) Every accused or his or her agent, or prosecutor or his or her agent who wilfully communicates with a person on a jury list for the purpose of obtaining information relating to that person which might be used in determining whether the person should be selected as a juror is guilty of an offence punishable on summary conviction.

COMMENT

The juror qualification form will not only provide information for determining those who are disqualified or who may be excused from jury service but will also assist counsel in making an informed peremptory challenge or challenge for cause. This much is obvious and clear. However some detriment to the availability of the form may be perceived. Would the proposed subsection 2(2) above sufficiently overcome such a detriment? As with all of the recommendations expressed in this Working Paper, we seek the readers' opinions on this question.

(Recommendation 3)

Section 7. *Abolition of Tales*

(1) Where a full jury cannot be provided notwithstanding that the relevant provisions of this act have been

complied with, the court shall fix another time for trial and the sheriff shall be directed to cause a new panel of jurors to be summoned.

(2) In no case may a *tales* be granted.

COMMENT

This section deals with the situation where an insufficient number of jurors are available to try a particular case. The present practice whereby extra people can be summoned immediately off the street is abolished. The granting of a *tales*, as such a procedure is called, is in most cases a severe inconvenience to the people summoned. Since the judge can shorten the time required for summoning an additional panel of jurors, no real hardship should be caused by the elimination of the talesman.

(Recommendation 3)

Section 8. ***Challenging Compliance with the Selection Procedures***

(1) The accused or the prosecutor may challenge the panel of jurors on the ground of substantial failure to comply with this Act in selecting the panel.

(2) If the judge determines that in selecting a panel there has been a substantial failure to comply with this Act, he shall stay the proceedings pending the selection of the jury in conformity with this Act, quash the indictment or grant other appropriate relief.

(3) No information regarding the challenge shall be published in any newspaper or broadcast before the judge has determined whether the alleged ground of challenge is true or not.

(4) If the judge determines that there has been no substantial failure to comply with the Act, no information

regarding the challenge shall be published in any newspaper or broadcast before the jury retires to consider its verdict.

(5) Every one who fails to comply with subsection (3) or subsection (4) is guilty of an offence punishable on summary conviction.

COMMENT

This section provides the parties with a remedy if the rules are not followed in selecting the jury. The challenge to the panel is restricted to the manner of selection; a party cannot challenge the panel on the grounds of its composition if the procedures for selecting it have been strictly followed. Also a challenge lies only for a "substantial failure". Thus it is clear that not every deviation from the procedure, no matter how slight, will constitute a sufficient ground for challenge. Subsections (3) and (4) were included because there is at present some doubt as to whether the judge has the power to restrict the publication of such a motion. The prejudicial effect of such a motion being made known to the panel could be great.

(Recommendation 3)

PART III — IN-COURT SELECTION OF JURORS

Section 9. ***Procedure for Selecting Jurors from the Jury Panel***

(1) The name of each juror on a panel of jurors that has been returned, his number on the panel and the place of his abode, shall be written on a separate card, and all the cards shall, as far as possible, be of equal size.

(2) The sheriff or other officer who returns the panel shall deliver the cards referred to in subsection (1) to the clerk of the court.

(3) In the presence of the accused and the prosecutor the judge shall announce the name of the accused and the gist of the major accusations, and then address the panel of jurors as follows:

> If anyone on this panel harbours any prejudice against the accused or anyone else involved in this case — if anyone is closely connected with a party to this case or with a witness who is to testify, or with one of the barristers, will you please stand?

(4) The judge shall examine any person who stands in response to the question in subsection (3), and if he is satisfied that the person harbours prejudice, or is closely connected with a party or counsel in the case or with a witness who is to testify, he shall direct that the card with the name of that juror be removed from the other cards.

(5) The clerk of the court shall cause the remaining cards to be placed together in a box to be provided for the purpose and be thoroughly shaken together.

(6) Where

(*a*) the panel is not challenged, or

(*b*) the panel is challenged but the judge does not direct a new panel to be returned,

the clerk of the court shall, in open court, draw out the cards referred to in subsection (2) one after another, and shall call out the name and number upon each card as it is drawn, until the number of persons who have answered to their names is, in the opinion of the judge, sufficient to provide a full jury after allowing for challenges.

(7) The clerk of the court shall swear each member of the jury in the order in which the names of the jurors were drawn.

(8) Where the number of persons who answer to their names is not sufficient to provide a full jury, the clerk of

the court shall proceed in accordance with subsections (6) and (7) until twelve jurors are sworn.

COMMENT

This section on the in-court selection of jurors is identical to section 560 of the *Criminal Code*, except for the addition of subsections (3) and (4). These additional subsections adapt and codify the suggestion made by the Ontario Court of Appeal in *R. v. Hubbert*:[59]

> Some trial judges make a practice of saying to the jury panel, before the selection process begins, something of this nature:
>
> > If there is anyone on this panel who is closely connected with a party to this case or with a witness who is to testify, will you please stand?
>
> (Rarely does anyone respond.) If someone does stand, the trial judge asks him to come forward (usually to the jury-box), and inquires further as to that person's connection with the case. To take obvious examples, if the juror is the uncle of the accused or the wife of a witness, or the brother of the investigating police officer, he ought not to serve!
>
> In our view, the trial judge on his own should excuse that prospective juror from the case, without more ado. The *Criminal Code* makes no express provision for it, but it does not expressly or impliedly forbid it either, and in our view it is in the power of the trial judge as part of his function of ensuring a fair trial. We think the practice of excusing jurors of obvious partiality is a desirable one in all cases.

In the result, then, all selection proceedings ought to be of record.

(Recommendation 3)

Section 10. ***Peremptory Challenges: Accused***

(1) An accused who is charged with an offence for which the minimum punishment is life imprisonment is entitled to challenge twenty jurors peremptorily.

(2) An accused who is charged with an offence not referred to in subsection (1) is entitled to challenge twelve jurors peremptorily.

COMMENT

The number of peremptory challenges for all offences should be increased. This will meet some of the objections raised by the abolition of the stand-asides. It can be noted that this number is still well below the number permitted at common law, that is, 35. The peremptory challenge has been attacked and praised. Its importance lies in the fact that justice must be seen to be done. The peremptory challenge is one tool by which the accused can feel that he or she has some minimal control over the make-up of the jury and can eliminate persons for whatever reason, no matter how illogical or irrational, he or she does not wish to try the case.

(Recommendation 3)

Section 11. ***Peremptory Challenges: Prosecutor***

(1) The prosecutor is entitled to challenge twenty jurors peremptorily where the accused is charged with an offence for which the minimum punishment is life imprisonment.

(2) The prosecutor is entitled to challenge twelve jurors peremptorily where the accused is charged with an offence not referred to in subsection (1).

COMMENT

The prosecutor is given the same number of peremptory challenges as the accused. Therefore "stand-asides" are abolished. The doctrine of "standing jurors aside" developed at a time when the Crown did not have the right to challenge jurors peremptorily. There would appear to be no reason to

permit the Crown in effect to challenge without cause more jurors than the accused can challenge.

(Recommendation 3)

Section 12. *Peremptory Challenges: Co-accused*

(1) Where two accused persons are jointly charged in an indictment and it is proposed to try them together, each is entitled to challenge peremptorily eight jurors and where more than two accused persons are jointly charged in an indictment and it is proposed to try more than two of them together, each is entitled to challenge six jurors peremptorily.

(2) Notwithstanding subsection (1), where an accused is charged with an offence for which the minimum punishment is life imprisonment, he is entitled to challenge twenty jurors peremptorily.

(3) Where two or more accused persons are jointly charged in an indictment and it is proposed to try them together, the prosecutor is entitled to challenge peremptorily the total number of jurors as are all the accused persons.

COMMENT

The accused might wish to challenge prospective jurors peremptorily because he believes that the juror might not be impartial because of his reactions to the facts of the case or because he believes that the juror might not be impartial towards the accused himself. Since all accused persons being tried together share a common interest in challenging jurors who might be partial for the first reason stated, in trials of co-accused the number of peremptory challenges for each accused is reduced for most cases.

(Recommendation 3)

Section 13. ***Peremptory Challenges: Multiple Counts***

Where an accused person is charged in an indictment containing more than one count and it is proposed to try him on more than one count at the same trial, the accused and the prosecutor are entitled to challenge peremptorily that number of jurors which they would be entitled to challenge as if the accused were being tried only on the count for which he is entitled to the greatest number of challenges.

COMMENT

Self-explanatory.

(Recommendation 3)

Section 14. ***Peremptory Challenges: Six-member Juries***

Notwithstanding anything in this Act, six jurors shall be sworn in the Yukon Territory and the Northwest Territories, and in those Territories the accused and the prosecutor are entitled to half the number of challenges provided for in sections 12 and 13.

COMMENT

Self-explanatory.

(Recommendation 3)

Section 15. ***Order of Exercising Peremptory Challenges***

The judge may in his discretion direct the order in which the parties are called upon to exercise their peremptory challenges.

COMMENT

This section replaces the present subsection 563(3) of the *Criminal Code* and leaves it to the judge to decide who must challenge peremptorily first. The judge may require the parties to alternate or may permit the accused to go first. Undoubtedly where there are multiple accused the judge will require the accused to go first as this will go some way to equalizing the "imbalance" between the Crown's grand total number of challenges and the reduced number available to each accused.

(Recommendation 3)

Section 16. ***Challenging the Impartiality of Jurors***

(1) A prosecutor or an accused is entitled to any number of challenges on the ground that a juror is not impartial between the Queen and the accused.

(2) In order to define the specific issue on a challenge, the party challenging may be required by the judge to state the reasons for the challenge, and if the party or counsel be unable or unwilling to do so, the judge may refuse to permit the trial of the truth of the challenge.

(3) The following rules apply to the trial on the issue of whether or not the juror is not impartial between the Queen and the accused:

(*a*) Where two or more jurors have been sworn the last two jurors sworn shall be sworn to try the issue.

(*b*) Where fewer than two jurors have been sworn the judge shall choose two jurors from the panel who shall be sworn to try the issue.

(*c*) Where a juror is challenged under this section, and the accused and the prosecutor agree that the juror is not impartial between the Queen and the accused the juror shall be excused without intervention of the triers.

(*d*) The juror challenged may be called as a witness on the trial of the issue.

(*e*) An accused or the prosecutor may adduce such evidence as will assist the triers in determining whether or not the juror challenged has a state of mind in reference to the charge, the prosecutor, the police, the victim, or to the defendant which would prevent him from acting impartially.

(*f*) The judge may direct that the trial of the issue shall take place *in camera* and in any case shall direct that the trial of the issue not take place in the presence of those members of the panel who have not been sworn as jurors or triers.

(*g*) The judge may give such direction to the triers as he considers necessary to assist them in determining whether or not they are satisfied on a balance of probabilities that the juror is impartial between the Queen and the accused.

(*h*) Where, after what the court considers to be a reasonable time, the triers are unable to agree whether or not the juror is impartial between the Queen and the accused, the judge may discharge them from giving a verdict and may direct that two other persons be sworn to try the issue or the court may, in its discretion, excuse the juror.

COMMENT

The procedure established in this section for challenging the impartiality of a prospective juror is basically the same as that set out in the case law, notably *R. v. Hubbert*.[60] We considered whether, under the proposed procedure, the party challenging a juror should have to state any reasonable grounds for believing such person to be partial. Unless extensive pre-trial investigation of prospective jurors were to take place, this information would seldom be available to the

parties. It was contended that if the parties have any *suspicion* that a prospective juror is not impartial they may challenge the prospective juror and satisfy themselves or the triers whether that person is impartial by questioning him about matters which might reveal some certain partiality. However, as it stands, the recommendation provides that the judge may require the challenger to state particular reasons. The judge must be able properly to direct and control the trial of the truth of the challenge, of course, and we seek readers' opinions about whether the requiring of stated grounds would be necessary and desirable to achieve that objective.

(Recommendation 3)

Section 17. ***Exercising a Peremptory Challenge after Challenging the Impartiality of a Juror***

(1) Where a party intends to challenge a juror peremptorily or intends to challenge the impartiality of the juror neither he nor the other party shall be called upon to challenge that juror peremptorily until the trial of the issue of impartiality has been completed.

(2) Notwithstanding that a challenge to a juror's impartiality has been found not to be true, either the prosecutor or an accused may challenge the juror peremptorily.

COMMENT

This provision codifies what has been the practice, that is, that a party may still exercise his peremptory challenge after a challenge on the grounds of partiality. The rationale of the peremptory challenge is to ensure to the extent possible that the accused feels he is being tried by an impartial jury. Therefore it should not matter whether it is exercised before or after a challenge on the grounds of partiality.

(Recommendation 3)

Section 18. ***Challenging the Qualifications of Jurors***

(1) A prosecutor or an accused is entitled to any number of challenges on the ground that:

> **(*a*) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to,**
>
> **(*b*) a juror is disqualified from jury service under subsection 1(2) of this Act.**

(2) Where a challenge is made under subsection (1), the judge shall determine whether the alleged ground of challenge is true or not, and where he is satisfied that the alleged ground of challenge is true he shall excuse the juror.

(3) The judge may, in his discretion, direct that the trial of the issue take place *in camera*.

COMMENT

This section is similar to sections 567 and 568 of the *Criminal Code*. These are essentially technical grounds for challenge and are best left to the judge to determine. The judge should have the power to deal with these challenges *in camera* as it may be that the reason will be embarrassing to the juror. The Crown for example may have information that a juror has a record for a criminal indictable offence which the juror, for whatever reason, has not disclosed on his questionnaire.

(Recommendation 3)

Section 19. ***Publication of Jury Selection Hearing***

(1) The Judge may direct that no information respecting any or all proceedings under Part XVII shall be published in any newspaper or broadcast.

(2) Every one who fails to comply with a direction made under subsection (1) is guilty of an offence punishable on summary conviction.

COMMENT

A judge should have the authority to prohibit publication of parts of the selection process if such publication might prove embarrassing to a potential juror or prejudiced to the accused.

V

Preliminary Matters

A. Protection of Juror's Employment

Recommendation 4

4.1. ***Offence***

An employer shall not deprive an employee of his employment, or threaten or otherwise coerce him with respect thereto, because the employee receives a summons, responds thereto, serves as a juror, or attends court for prospective jury service.

4.2. ***Penalty***

Every employer who is guilty of an offence under section 1 is guilty of an offence on summary conviction and is liable to a fine of not more than $5,000, or to imprisonment for not more than three months, or to both a fine and imprisonment.

4.3. ***Compensation and Reinstatement in Addition to Penalty***

Where a person is convicted of an offence under section 1, the provincial judge making the conviction shall, in addition to the penalty imposed pursuant to

section 2, order that the person convicted pay the employee reimbursement for lost wages and reinstate the employee.

COMMENT

An employee could probably sustain an action for wrongful dismissal against his employer if the employee lost his job because he had to perform jury service. However, a common law action for wrongful dismissal is not a sufficient remedy in such circumstances. To unskilled workers the amount recovered by a wrongful dismissal action is often inadequate compensation for loss of employment. Furthermore, because of the improbability that an employee would bring such an action and the improbability that damages would be very onerous, such a remedy does not serve as a very serious deterrent to the employer.

Alberta and Québec are the only provinces which have specifically enacted provisions prohibiting employers from threatening or causing loss of employment or any other penalty to employees who serve as jurors. There is no civil right of action in the Alberta statute; however the employer is liable on summary conviction to a fine not exceeding $1,000, or to imprisonment for not more than three months, or both.[61] Newfoundland has not specifically dealt with this problem, but the wording of section 2 of *The Judicature (Amendment No. 2) Act*, may be broad enough to cover it: "An employer . . . shall pay such employee the same wages as he would have received if he had been at work . . . and . . . shall not penalize such employee by deprivation of vacation time or by any other means whatsoever."[62]

The proposed recommendation prohibits employers from depriving their employees of work, or from threatening to do so, because of jury service. It creates both an offence punishable by a fine and/or imprisonment and a compensatory penalty for damages. It also provides for a remedy of reinstatement because in many cases it is unrealistic to expect that liquidated monetary compensation can compensate for loss of continuing employment. A legislative provision enacting the

recommendation would also have to include a section making officers or agents of corporations personally liable if they authorized or acquiesced in the contravention of the section. And perhaps it would be advisable to include a provision putting the onus of proof on the defendant, if the employee were dismissed while serving on a jury, to prove that the employee's jury service was not the cause of the dismissal.

This sort of protection against any offending employer of a juror would, no doubt, be an apt subject of criminal law enacted by Parliament. It would also, however, be quite an appropriate subject of provincial legislation in which the penalties or civil remedies, if any, could be very finely drawn. On balance it seems more appropriate for provincial enactment. Accordingly, if no strong support throughout Canada be expressed in favour of the foregoing statutory propositions, they will not be recommended to Parliament. We seek readers' opinions on this matter, too.

B. Length of Jury Service

Recommendation 5

No person shall be required to serve as a member of a jury panel, or as a juror, within sixty months after the last day of that person's previous service as a member of a jury panel, or as a juror, whichever is the more recent.

COMMENT

There is a great deal of variation from province to province on how long jurors are required to serve on jury panels. Our survey of jurors revealed that they served anywhere from four days to three weeks.

But while it does not appear to be a matter of grave concern under present practices, we think that maximum duration of jury service should generally not be longer than one

assize and that jurors should normally not sit on more than one assize within a five-year period. Short jury terms make it possible for more people to serve on juries and minimizes the personal disruption of jury service. It should mean that most people would be able to serve without fear of undue economic hardship. Thus, the jury would be more representative of the community and the burden of jury duty more equitably distributed. Another benefit would be that more people would be exposed to the jury system and would thereby gain an increased appreciation of judicial administration.

In cases like the recent dredging trial in Toronto in which the jurors were engaged for 14 months, provincial authorities ought to consider some immunity from service for much longer than five years. Although it may be extremely unlikely that any of those randomly selected jurors would ever again be summoned, a ten-year immunity would not seem unreasonable.

C. Compensation of Jurors

Recommendation 6

[No specific statutory form for remuneration of jurors is recommended, because the responsibility for the maintenance of provincial courts of criminal jurisdiction composed of a judge and jury appears (subject to section 100 of the *British North America Act*) to be wholly a matter for the provincial legislatures.]

COMMENT

Jurors in most provinces are presently paid a per diem fee which varies considerably in amount from province to province. In addition, jurors are ordinarily paid an allowance in respect of mileage and a subsistence allowance representing their reasonable and actual expenses for items such as meals and lodging necessarily incurred in the discharge of their jury duties. Many employers continue to pay employees wages and

salaries during their absence from work by reason of jury service. However, this practice is not prevalent in the unorganized and unskilled sectors of the labour market. In only one province, Newfoundland, are employers required by legislation to continue to pay employees' salaries during jury service in a criminal case. However, the Newfoundland legislation does not exempt employers of only a small number of workers from this obligation and it does not make any provision for relief of the employer who can establish economic hardship.[63] Our survey of jurors, however, indicated that the majority of jurors in each jurisdiction who had a regular income received their regular pay.

A number of considerations must be balanced in determining the appropriate rates and methods of compensating jurors. First, if the fees are too low jury service will impose an undue economic burden on many jurors or make it difficult to obtain a jury that represents a true cross-section of the community. Furthermore, jurors who are required to endure economic hardship are perhaps more likely to be dissatisfied with their experience and, as a result, to discharge their functions less responsibly. Indeed, our survey revealed that those who are unhappy about the fee were also less likely to be favourably disposed to the jury system as a whole.

A second matter which must be considered in establishing a fee schedule is that if fees are too high jurors will receive a substantial windfall for serving on a jury. This is particularly true if jurors are entitled to the payment of jury fees even when their employers continue to pay their ordinary salaries. Jury service, being the discharge of a civic duty, ought to be neither financially profitable, nor yet so ruinous as to induce many people to seek exemption.

The jury fee schedule should ensure, insofar as possible, that jurors are treated as equals. The fees should not underline the socio-economic class differences of jurors. It is important that during jury service they regard one another in all respects as equals.

Ideally then, jury fees should ensure that jury service in no way disrupts a person's ordinary earnings, that no one

receives a windfall while serving on the jury, and that jurors are treated as equals. Some employers continue to pay employees while they are serving on the jury, and some require them to turn over their jury fees while others do not. The reckoning of income earned by commissions, lost during jury service, could be most speculative. People such as homemakers may have no employer-paid income at all. If the State were to compensate each juror for lost salary it could be a very expensive and administratively complex exercise. Furthermore, compensating each juror for lost salary would highlight the socio-economic differences among jurors and detract from the sense of civic obligation inherent in individual jury service.

This matter of remuneration of jurors bears some relationship to their morale in adjudicating criminal cases. Therefore, despite the fact that we offer no specific statutory formulation on this subject, we do suggest that where provincial provisions are now perceived to be less than satisfactory, the legislature might consider some provisions like those which follow.

1. A fixed daily remuneration could be paid to each summoned member of a jury panel and to each sworn juror for every day, including a part of a day, during which the person is in attendance;

2. The daily remuneration, in order to remain relevant in terms of the cost-of-living, and to avoid frequent adjustment by legislation, could be based on the provincial minimum wage or expressed as a percentage of that sum;

3. Employers could be required to continue the wages or salary of every employee during absence for jury service;

4. Salaried employees and wage earners called to jury service could be obliged to make an assignment of their jury remuneration to employers who continue their wages or salaries; and

5. Persons who are not in receipt of wages or salary and/or who are unable to earn commissions during jury service, could be permitted to retain their jury remuneration.

Certain refinements of the above provisions relating to overtime, holiday pay and collective agreements could no doubt be considered. However these, too, seem to be wholly matters of provincial jurisdiction, if not under the administration of justice, then under property and civil rights in the province or even as matters of a merely local or private nature in each province. Parliament should enact that every such provision concerning wages and salary bind the Crown in Right of Canada. We should appreciate public response and comment about our approach to this matter of remuneration of jurors.

D. Jury Orientation

Recommendation 7

7.1. Prospective jurors should receive an orientation which thoroughly acquaints them with the nature of their duties, trial procedure and legal terminology.

7.2. This orientation should be accomplished by the use of juror handbooks mailed to jurors prior to their jury duty, a five-to-ten minute slide and audio presentation on their first day of jury service, wherever facilities are available, and by the oral instructions of the judge just prior to hearing the case upon which they are sitting.

7.3. The orientation materials referred to above should be prepared under the auspices of an organization such as the Canadian Judicial Council, and adapted for use in each province by the Superior Court of that province.

COMMENT

Thoroughly acquainting jurors, prior to their service, with the nature of their responsibilities, the conduct of a judicial trial and the common concepts that will be used throughout it is of utmost importance if the jury is to fulfill its functions. As the result of stories in newspapers, the entertainment media or simply general gossip, jurors often labour under many misconceptions about these matters. If jurors are not thoroughly familiar with what is expected of them they will face their task with apprehension and anxiety. Trial delays or lengthy *voir dires* will frustrate them. It will be more difficult for them to concentrate on an evaluation of the evidence if they are not familiar with basic trial procedure and terminology. The confused and bewildered juror is more likely to retreat from his or her task with a sense of alienation. To overcome these problems and to enhance the decision-making abilities of jurors and their respect for the legal system, good quality juror orientation is essential.

At present, in most provinces, judges and sometimes sheriffs orally instruct the jury about their responsibilities and generally about court procedures prior to the trial. In some provinces sheriffs deliver preliminary oral instructions to the whole jury panel, while judges give more specific instructions to the jurors selected before the trial of a particular case.

In a few provinces juror information books are also supplied to jurors. For example, the juror handbook, "Your day in Court: Jury Duty" is currently in use in Ontario. The handbook contains a discussion of trial by jury, an explanation of the function of the jury and the selection of juries, and a description of the civil and criminal trial processes. There are also short notes on proper dress, the oath, and the law relating to jury secrecy. The Manitoba handbook is a first-class model of this sort of publication. These handbooks are sent to jurors prior to their being called for jury service.

These two methods of jury orientation complement one another and the use of both should be encouraged. Jury handbooks ensure that uniform information is given to all jurors.

They can contain detailed information on the responsibility of jury service, the types of cases which might be heard, and expected jury behaviour. If sent out just prior to the call for jury service, they can be read and studied by jurors at their leisure. Not only should this increase the sophistication of jurors, but it should dispel some of the apprehensions of many jurors prior to their actual service. As well, a local insert could inform jurors about such things as the normal hours of sitting at the court, where the court building is located, where they are to report to, whether parking space is available and other matters jurors might wish to know before they actually report to the courthouse.

It is important that juror handbooks be complete, conveying all the information about which potential jurors may wish and need to know in an accurate and understandable manner. While some provinces like Manitoba have excellent handbooks, yet, to ensure these goals are attained across the country, it is recommended that the Judicial Council have a handbook prepared which can be widely circulated for suggestions and criticisms, and then approved by the Council.

Obviously a written handbook received prior to trial will be useful to jurors in a way that oral instructions heard just prior to the case cannot be. However, oral instructions by the judge at the beginning of the case also perform an important function. They permit the juror to become acquainted with the judge and to learn of any peculiarities in the manner in which he conducts the court or the case they are about to hear. They also permit the jury an opportunity, just prior to hearing the case, to become familiar with some of the legal concepts with which they will be dealing, the procedure of the courtroom, and their role in the trial. Such preliminary instructions to the jury should cover such matters as:

(*a*) the function of the indictment,

(*b*) the function of the jury as the sole judges of the facts,

(*c*) the restriction of their consideration to the evidence,

(*d*) the presumption of the accused's innocence,

(*e*) the benefit of reasonable doubt,

(*f*) matters concerning credibility,

(*g*) the functions of court and counsel,

(*h*) the elements of the crimes charged,

(*i*) a glossary of some of the terms to be used,

(*j*) admonition as to outside conversation, newspaper accounts, etc.,

(*k*) explanation of the procedure to be followed, including the order of presenting proof and the examination of witnesses,

(*l*) the importance of cross-examination,

(*m*) the right of the accused to remain silent,

(*n*) the need occasionally to send the jury out of the room while matters relating to the admissibility of evidence are considered,

(*o*) whether or not the taking of notes is permitted,

(*p*) explanation of the verdict and how it is reached,

(*q*) obligation to keep secret their deliberations.

After hearing the preliminary instructions the jurors should be less anxious about their task, better able to understand the procedure, and thus, better able to appreciate its significance, and also they should be better able to recognize and evaluate the relevant evidence when it is presented. It would appear that many Canadian judges presently give the jury fairly detailed preliminary instructions. We think that such instructions ought to be mandatory.

Both jury handbooks and oral instructions by the judge may not, however, ensure that all jurors are so adequately informed that they can discharge their responsibilities to the best of their abilities. Handbooks may not be read, and even if they are, the printed word may not convey a good sense to some jurors as to what exactly their responsibilities are or how judicial trials are conducted. Because specific oral instructions are not given until the juror is actually chosen to hear a case, they can do little to alleviate the prospective jurors' concerns before this time. Therefore, we recommend that as part of the orientation program wherever the facilities can be provided, all jurors view a five-to-ten minute slide and audio presentation about jury service and courtroom procedures. This device, usually in the form of a videotape presentation, is used in several American jurisdictions and its success has been widely acclaimed. In a very brief period of time it permits jurors to become familiar with courtroom procedures and their responsibilities. The medium engages their interest and is one with which most people are familiar. The advantages of a slide presentation over a videotape presentation are that it is much less expensive and by simply changing a few slides can be adapted to local conditions and practices or changes in courtroom procedures. The Law Reform Commission in conjunction with the National Film Board has prepared a sample six-minute jury orientation slide presentation which can be made available to any interested persons upon request.[64]

VI

The Judge's Charge to the Jury

A. Instructing the Jury on the Law

Recommendation 8

The Adoption of Jury Instruction Guidelines

(a) Preparation. **A committee under the auspices of an organization such as the Canadian Judicial Council should prepare a collection of accurate and understandable jury instruction guidelines to be made available to all judges for use in criminal cases.**

(b) Composition of the Committee. **The Committee who prepare the jury instruction guidelines should be composed of judges, defence counsel, prosecutors, legal academics, lay persons and communication experts.**

(c) Procedures of the Committee. **The committee should have access to a part-time or full-time support staff to assist in the research and testing necessary to establish the jury instruction guidelines. The Committee should continue to function after the initial preparation of the guidelines in order to assess current legislative and judicial developments and to ensure that the guidelines are kept up-to-date.**

(d) Use of the Jury Instruction Guidelines. **The verbatim use of the guidelines should not be mandatory. Rather, as their title suggests, they would be only guidelines, to be modified or supplemented in particular cases where necessary to fit the facts or particular aspect of the case.**

COMMENT

Introduction

Questions of law are decided by the judge; questions of fact are decided by the jury. This well-known dichotomy of functions raises the problem of who applies the law to the facts. Because the jury in criminal cases returns a general verdict of guilty or not-guilty, it must discharge this responsibility. Thus, to enable the jury to carry out its duties, the judge instructs the jury on the law which governs the case. In reaching a verdict the jury must then apply those instructions to the facts as it finds them.

Jury instructions must therefore, satisfy two conflicting requirements: the need to state accurately the relevant law and the need to state the law so that the jury understands it. The need to state the law accurately is, of course, an obvious requirement. If the case is appealed, counsel will scrutinize the charge for all possible errors in the statement of law. The court of appeal will hold the instructions to be in error unless the judge has correctly stated the law in all respects. (Of course, not every error causes a substantial wrong or miscarriage of justice.) Because strict legal correctness is the primary concern of the appellate courts, it is naturally the concern of trial judges as well. Indeed, to eliminate the possibility of error from their statements of the law, trial judges will sometimes include long quotations from appellate court judgments in their instructions and in other ways generally attempt to "boiler-plate" them. This often results in instructions which are long, repetitious, and disjointed.

The need to state the law correctly may thus often conflict with the other important requirement of jury instructions: that they be understandable to the jury. The allocation of responsibility between the judge and jury is premised on the jury's ability to understand and apply the law. It is often alleged that one of the most serious deficiencies of trial by jury, and indeed an aspect of it which is sometimes said to place the institution of the jury in jeopardy, is the jury's inability to follow and comprehend the instructions given by the judge. If jurors are confused about the law they are to apply, they cannot perform their function properly, and a just verdict will be reached only by chance.

Our survey of judges also led us to the conclusion that something to improve the quality of jury instructions ought to be attempted. Only 23 per cent of the judges were quite certain that juries generally understand the judge's instructions. And while most (82 per cent) felt that it was at least probable that juries understood what was being told to them, a significant minority (18 per cent) felt that it was probable that juries did not understand what was being told them. Not surprisingly, judges who felt that juries probably did not understand judge's instructions were more likely to prefer judges over juries on the question of who is more likely to arrive at a just and fair verdict (74 versus 10 per cent of such judges). They were also much less likely to have a very favourable overall attitude toward the jury (28 versus 90 per cent of such judges).

We found further evidence that jurors have difficulties with the present instructions on the law given to them by judges in an experimental study we undertook. That study is more fully described later on in this chapter.

From time to time, proposals have been made in an attempt to reconcile the goal of stating the law accurately with that of making the charge comprehensible to the jury. In this chapter a number of such proposals will be explored: the adoption of jury instruction guidelines; the use of lay persons and communication experts in the preparation of jury instructions; the improvement of the procedure for the preparation

and delivery of jury instructions in particular cases; and the use by the jury of written instructions.

The goal is to develop a process of jury instruction which is expeditious, reduces the number of appeals, and results in instructions which are understandable and accurate.

The Adoption of Jury Instruction Guidelines

The recommendation that judges have available to them jury instruction guidelines should have broad support from the Canadian judiciary. In our survey of judges, 78 per cent of the respondents felt that "a collection of standardized instructions drawn up by leading members of the bench and bar would be useful to [them] in explaining the law to the jury". In fact, in all regions of the country except British Columbia, over 80 per cent of the respondents favoured such instructions. In British Columbia only 13 of the 23 judges responding (56 per cent) wanted such instructions.

In a recent book on instructing the jury, pattern jury instructions are described as "the greatest modern improvement in trial by jury."[65] They were first used over thirty years ago in California, and are now used in the majority of United States jurisdictions.[66] Pattern jury instructions were, and continue to be, employed in most American jurisdictions in response to three problems, all of which are present in Canada. First, judges, particularly newly appointed judges, spend an inordinate amount of time preparing jury instructions. Sometimes they borrow a "precedent" from another judge or quote passages out of a form book, but often they have to prepare instructions by researching case law and formulating their own charges. Much of this time and effort is wasted because judges duplicate each other's work. As well, because the wording of individually prepared charges varies, counsel are also forced to spend extra time examining the wording of each charge instead of being able to concentrate on whether the appropriate instructions were given.

Second, when each judge prepares his or her own instructions on the law, a great number of reversals result because of misdirections. The 1976 volumes of Canadian Criminal Cases reveal that in the sixty-two reported appeals from trials by jury, misdirection to the jury was an issue in fifty of them. The misdirection resulted in a new trial in thirty of these cases. Indeed, the rate of reversals would likely be even higher if it were not for a liberal application of the "no substantial wrong or miscarriage of justice" doctrine, and the appellate court practice of overlooking an error by insisting that the instructions must be read as a whole. Of course the sixty-two cases were reported only because they were appeal cases. They do not represent the totality of jury trials in Canada during the pertinent period.

Reversals result in an enormous and often needless waste of time and money. More accurate instructions would result if, instead of having individual judges research the law and prepare instructions, resources were pooled and instructions prepared in a systematic fashion. Although jury instruction guidelines would not eliminate all appeals based on alleged misdirections, because judges could still err in selecting which instructions to use in a particular case or because some guidelines might be incorrect in the court of appeal's view, their use should substantially reduce the number of these appeals.

A third problem which justifies the development of jury instruction guidelines is that even if a judge in preparing his or her own instructions states the law correctly, in some cases he or she will not have the time or the ability to render them understandable to the jury. Clear and simple writing, particularly about legal concepts, is enormously time consuming and extremely difficult. The incomprehensibility of many jury instructions is a matter of grave concern.

Definition

Jury instruction guidelines (or, as they have been variously called: standardized instructions, model charges and

pattern jury instructions) are normally prepared by a committee of lawyers, judges and law professors and are usually published in loose-leaf fashion. Each instruction is a brief, accurate and complete statement covering a single situation or point of law.

During the preparation of the instructions, legal concepts are first broken into their basic components and then drafted so that they can be combined to provide a complete statement of the law governing any particular case. Each instruction is usually followed by a commentary describing when the model charge should be used and citations to the appropriate authorities. Corrections or suggestions for improvements in the instructions and up-dated annotating, including recent cases relating to the instruction, are published on an on-going basis and inserted in the loose-leaf service. Ideally, when the instructions are assembled in a particular case, by an appropriate arrangement of the individual standard instructions, they will explain all the law to be applied in the case in clear, concise, impartial and accurate terms, and in a manner which will be intelligible to the average juror.

There is some conflict in the United States as to whether or not the use of pattern jury instructions should be mandatory. At least seven jurisdictions have made the use of pattern instructions mandatory and require that the appropriate instructions be read verbatim by the judge. This procedure is designed to ensure that an impartial and uniform statement of the law is given to the jury in every case. However, this approach means that instructions cannot be tailored to fit the individual facts of a case. It has even been held to be an error to paraphrase or expand upon a mandatory instruction after the jury has indicated that they do not understand the original charge.

In several jurisdictions in the United States, however, pattern jury instructions are sensibly treated simply as guidelines which can be tailored to the facts of each case. The judge is expected to speak directly to the jury, paraphrasing the suggested instructions instead of reading them, and making appropriate references to the facts of the case at bar. This

approach to the use of pattern jury instructions seems preferable, since it results in instructions which are more accurate in individual cases and easier to understand.

Pattern jury instructions would probably resemble, to a great extent, many of the jury instructions which are now privately exchanged among judges. However, the systematic preparation and publication of the instructions, as contemplated by the recommendation, have a number of advantages over the present method of preparing instructions.

Advantages

There are five major advantages to the use of jury instruction guidelines: time-saving, accuracy, uniform treatment, impartiality, and, intelligibility.

1. Time-saving

Because pattern instructions will be drafted as briefly and concisely as possible, they should reduce the time spent instructing the jury. However, the major time-savings will occur in trial preparation. Judges will be spared the duplication of effort which results when each prepares his or her own instructions; and, because the pattern instructions will be annotated, less research will be necessary to determine what charges should be given in a particular case.

These time-savings should allow the judge to concentrate on tailoring the instructions to fit the particular case. Lawyers, knowing the general content of the charge the judge will use, will be able to prepare their cases more quickly and will not have to consume so much time deciding whether an incorrect charge was given.

2. Accuracy

Pattern jury instructions should be more accurate than the instructions expressed at present for at least three reasons:

First, the pattern instructions will be prepared by a committee of lawyers, judges and law professors. This concentrated pooling of resources should eliminate most errors. Second, the committee will be able to take the time to engage in thorough research, thought and writing with respect to each instruction. Third, since they will be published for use by judges and lawyers, errors in the instructions will be quickly discovered and corrected.

3. Uniform Treatment

The use of pattern jury instructions will ensure that the law is applied uniformly across the country.

4. Impartiality

At present, judges who are caught up in the heat of a trial may be unconsciously swayed by the equities of a particular case and instruct the jury in a way which is overly favourable to one side. Although pattern instructions cannot be expected to eliminate all subconscious bias, they should remind the judge of his duty to give an impartial statement of the law by providing an objective standard against which to measure the actual charge to the jury. They should also make it easier to appeal cases where the judge's charge has been influenced by his views of the case.

5. Intelligibility

Pattern jury instructions will provide guidelines which the trial judge can use in formulating his charge to the jury. They will provide him with clear, concise statements of the law which he can use in whole or in part, depending upon how well he feels they express the issues in a particular case. Because the instructions will be drafted as simply and briefly as possible, the jury will be better able to follow and understand them. Again, the time-saving resulting from the use of patterrr instructions will enable the judge to concentrate on

selecting the appropriate charges and then tailoring them to the facts, thereby improving the quality of charges in general. Futhermore, they will provide a base for improving the understandability of jury instructions in the manner described below.

These advantages have been realized in those jurisdictions in the United States that have adopted pattern jury instructions. A study prepared for the American Judicature Society concluded that pattern jury instructions have been successful in "reducing time spent preparing instructions, eliminating much of the cost and delay of unnecessary appeals, increasing the intelligibility of the instructions, promoting uniformity, and limiting the number of instructions given."[67]

Common Criticisms of Jury Instruction Guidelines

Pattern jury instructions are commonly criticized for a number of reasons: First, it is feared that judges will use the pattern instructions verbatim without individualizing them to suit the facts and circumstances of each case. Even if the instructions are not made mandatory, judges will be reluctant to depart from them because of fear of error. Second, judges might simply read them verbatim without looking at the jury or otherwise delivering them in an interesting or understandable manner. It has been alleged that pattern jury instructions "like all canned products lack freshness."[68] Third, there is a fear that pattern jury instructions will stunt the judicial development of the law by freezing the language of jury charges.

None of these criticisms is directed to the use of pattern jury instructions; they are all criticisms of their misuse. Pattern jury instructions are intended to act only as an intelligent guide to the preparation of the jury charge; they are not intended as a substitute for careful thinking about and preparation of the charge and its modification to suit the facts of individual cases; they are not intended to be recited verbatim in a monotone without anecdotes peculiar to the case before the jury; and, finally, they are not intended to be inscribed in granite — as the law changes, the instructions themselves

must change to reflect the jurisprudence of the appellate courts. There is no evidence on which to base a claim that judges would fail to use the instructions as they are intended to be used. Furthermore, all of these dangers are present even under the present system, in which judges use charges which they have prepared in other cases or borrowed from other judges as precedents.

Another concern about the introduction of pattern jury instructions is that they might inadvertently result in the modification of the substantive law. This danger is particularly great when the drafting committee is composed of people with similar points of view because they might agree on a pattern instruction which gives a "slanted" or biased statement of the law. For example, in the United States, it is sometimes alleged that pattern instructions in civil cases tend to favour the plaintiff. The answer to this problem, however, is not to refrain from drafting pattern jury instructions for fear that they may not accurately state the law, but instead to take every possible precaution to ensure that they do give an impartial and accurate statement of the law. One way of ensuring this is by a careful selection of committee members so that diverse views are represented.

While not a panacea, jury instruction guidelines, carefully prepared and properly used, will, we think, better enable the jury to discharge its important function of applying the law.

Composition of the Committee

It is clear that jury instruction guidelines must be legally accurate. However, they must also be understandable to the jury. This latter requirement is perhaps even more difficult to achieve than the former. Instructions tend to be prepared by judges for judges.

This major goal for any jury instruction project — rendering the instructions intelligible — might not be accomplished if the drafting committee is composed solely of legally trained persons. Such a committee might draft instructions which

effectively communicate only to lawyers. Lay persons and communication experts should be members of instruction-drafting committees. Some United States jurisdictions have recently recognized this need. In Montana, a lay person (a journalist) was a member of the drafting committee and had a veto power over the language used in all instructions.[69] Other drafting committees, for example, in Arizona, Florida and Pennsylvania, have included communication experts.[70] As well as assisting in the drafting, these experts have conducted empirical tests on the comprehensibility of the drafted jury instructions.[71] These tests involve post-verdict interviews with jurors and experiments with simulated juries. In New York, a method of continually evaluating the comprehensibility of jury instructions has been established. All questions asked by jurors to judges are recorded on a special questionnaire. The questionnaires are then collated and the results examined periodically in order to determine, among other things, whether particular instructions are not being understood by the jury.[72]

A lay person on the committee, perhaps a journalist, would act as a constant reminder that legal language is often utterly incomprehensible to a lay person. The lay person could also detect connotations in words frequently used in instructions of which lawyers, familiar with the legal meanings, might be unaware.

Communication experts could assist in the drafting by applying to the instructions the variables which are known to affect the perception, memory and comprehension of language. In the Study Paper, a chapter on *Language and Jury Instructions*, summarizes the results of psycholinguistic research and reveals the way in which variables such as the use of passive verbs, abstract words, negatively modified words and self-embedded sentences affect the understandability of language. To test whether the application of these principles would improve the understandability of legal instructions, we undertook an experiment at the Ottawa Courthouse. Based on a reported case of murder involving provocation, we prepared a statement of facts. We then had a judge prepare the instructions on the law which he would give to a jury in such a case

(indeed, the original instructions). Then, with the assistance of a linguist, we prepared a revised charge, changing the original charge in some respects by applying the principles which affect the understandability of language (the revised charge). The facts and the two charges were read to two separate sets of jurors. The results of the experiment confirm that an application of the principles discussed in the aforementioned chapter on *Language and Jury Instruction* produces legal instructions which are more understandable. Out of the 37 jurors who heard the original charge, 7 reached the wrong verdict based on the facts. However, all jurors who heard the revised charge correctly applied the law to the facts. After hearing the instructions, the jurors were asked a number of straightforward questions testing their understanding of the law. Those jurors who heard the revised charge performed significantly better on this test of their understanding of the law than those who heard the original charge. This was particularly so with respect to those jurors who had a high school education or less. This experiment led us to the conclusion that something could be done to improve the understandability of legal instructions, and that a communication expert ought to be employed to assist in the preparation of jury instruction guidelines. We do not doubt that the services of a francophone expert would produce the same sort of benefit for instructions to be given to French-speaking juries.

Recommendation 9

The Procedure for Preparing and Delivering Instructions in Particular Cases

> ***(a) Submissions by Counsel.*** **At the close of the evidence, or at a reasonable time prior thereto, the parties shall be given the opportunity of informing the judge of the instructions on the law which they think are relevant to the case. If written submissions are made, copies shall be given to the other parties in the case. Submitted instructions, whether given in writing or orally, shall form part of the record.**

(b) Pre-Address Conference. **Prior to counsel's arguments to the jury, the judge shall hear submissions by counsel on what instructions should be given to the jury. The judge should then inform them of what instructions he or she intends to give. This conference on instructions should be held out of the presence of the jury, but should form part of the record.**

(c) Timing of Instructions. **The judge shall instruct the jury on the law following all counsel's closing addresses to the jury.** [This recommendation proposes no change, but is expressed here for completeness.]

(d) Objections to the Instructions. **Immediately following the judge's instructions on the law, and in open court, but out of presence of the jury, the parties shall be given an opportunity to object to aspects of the judge's instructions. If the original instructions were ambiguous, erroneous, or unfair, and any such misdirection might affect the jury's verdict, the judge shall recall the jury and give them additional instructions. Failure by any party to object to the judge's instructions to the jury in any particular, shall not constitute a bar to appeal in that regard, where the taking of such an appeal would otherwise be permissible.** [This recommendation proposes no change, but is also expressed here for completeness.]

COMMENT

If jury instruction guidelines are adopted, the following procedure for instructing the jury would speed up and simplify the process and reduce the possibilities of error.

Submissions by Counsel

At some time before the close of the evidence, counsel should be permitted to request that the judge give particular instructions to the jury. The judge will have a series of standard instructions on such subjects as reasonable doubt, the

credibility of witnesses, and the difference between direct and circumstantial evidence. Thus, counsel's request for particular instructions will serve, in the main, to point up issues of law peculiar to the case. To preserve a record for appeal, these requests may be submitted to the judge in writing. If so, copies should also be supplied to all other parties so that they have notice of the requested instructions and, if they disagree with them, they could argue that such instructions should not be given.

This rule is simply one of convenience. The practice would inform the judge of the instructions which counsel feel are relevant to the case and thus assist the judge in preparing the instructions that he or she will deliver. The rule would not relieve the judge of his or her responsibility for instructing the jury on all relevant points of law. And, of course, the judge would not be bound to use the exact language which appeared in the written submissions, or indeed be required to give the requested instructions at all.

Many judges at present invite counsel to make submissions on the law prior to the charge, and our survey of judges indicates that most judges (79 per cent) are in favour of such a practice. Typical comments by judges included the following: "It is very useful to have the opinion of counsel on particular points which they wished to have drawn to the attention of the jury. It is much more efficient to have these comments prior to the charge. There will be circumstances where counsel asks for further instruction following the charge so that it is not a foolproof method. But it is of great assistance and helps to clarify the issues for the jury. The judge, of course, must exercise his discretion in deciding whether he will accept the suggestions of the counsel." "I think it is important for counsel to bring any relevant law or cases to the judge's attention so that, if it is appropriate, it can be included in the judge's charge. This is done sometimes now or on *ad hoc* basis."

Pre-address Conference

Some Canadian judges hold a conference with counsel prior to counsel's closing addresses to the jury. At this time,

that portion of the charge relating to the law is discussed with counsel.[73] However, this is not common practice. Thus, in the vast majority of cases, counsel do not know what will be contained in the instructions on the law until the judge delivers his charge to the jury at the end of the case. Even under the present practice, but particularly if jury instruction guidelines were adopted, a pre-address conference would have numerous advantages.

First, such a conference would ensure that the judge is fully informed of the theories of the Crown and the defence, and the legal principles which counsel think should govern the case. This should assist the judge in accurately formulating his instructions.

Second, under the present practice, counsel are placed in the difficult position of having to argue their cases before the jury without knowing what the judge's charge on the law will be. A pre-address conference would permit counsel to structure their final arguments in light of the legal principles upon which the jury will be instructed. This should permit them to argue the case more intelligently.

Third, a pre-address conference will reduce counsels' objections to the charge as delivered to the jury because, before giving the charge, the judge will be aware of most of counsels' possible objections and will be able to reformulate his or her charge accordingly. Under the present practice, counsel find it difficult to detect any errors in the charge during the time which the judge spends delivering it to the jury. Thus, counsel may not be able to make a timely objection. This could have serious repercussions because it may give the jury a false impression of the law and, at least under the present court rules and case law, counsel may also lose the right to a new trial. Even if counsel detects an error in the charge and brings it to the attention of the judge, the damage may have already been done. The subsequent correction of the charge is often unable to cure the prejudice resulting from the initial instruction. Conversely, the jury may put undue emphasis on the re-instruction since it is the last thing which they hear before their final deliberations.

Given these advantages, what are the possible justifications for denying counsel the opportunity of considering the proposed instruction on the law prior to counsel's closing arguments and prior to its delivery? It could be argued that the judge may wish to alter the charge in light of remarks made by counsel in their final arguments. But surely providing the judge with a sensible leeway to make such changes would not destroy the good sense of allowing counsel to know the general content of the judge's charge in advance.

Another possible objection to a pre-address conference is that the judge would not be able to prepare the charge and have it typed quickly enough to be able to give copies of it to counsel before they present their arguments. But this is not a valid point because counsel need only to be made aware of the substance of the judge's charge. The use of jury instruction guidelines would mean that counsel would already be aware of the general charge. When the judge has ruled on whether he will use the instructions requested by counsel, he can simply inform them orally of any additional charges which he will be making. Any argument that the proposed procedure will unduly delay the progress of the trial is easily met by pointing out that it should save a portion of the enormous cost of both time and money caused by the substantial number of reversals for errors in the charge. If pattern jury instructions are adopted, a conference at which counsel and the judge discuss the appropriate instructions on the law should not last more than fifteen or thirty minutes. Furthermore, in many cases there is no reason why it could not be held at some reasonable time before the close of evidence.

A final objection which is often made to pre-address conferences is that they occur "off the record". This makes it very difficult for an appellate tribunal to review an alleged error in the charge since there is no record of the reasons for the charge or whether any objection was made to it at trial. Although it has been argued that allowing counsel to speak informally and candidly saves the time and makes for a better charge,[74] the arguments in favour of making it a part of the record are compelling: it avoids allegations of "deals"; it

preserves the record for appeal; and, it preserves the public nature of the trial.

Pre-address conferences are not intended to shift the responsibility for the charge from the judge to counsel, but are only intended to involve counsel at an earlier stage in the preparation of the charge so that they can present their arguments in light of the judge's instruction on the law. Such conferences must be arranged so that they form part of the trial record. For example, counsel could submit copies of their requested instructions, if in writing, to the judge and to each other just prior to the pre-address conference or at such earlier time as the judge might order. They would be given an opportunity, in the absence of the jury, to make representations as to the suitability of the proposed instructions. The trial judge would then indicate which of the proposed directions he would give and also inform counsel of any additional instructions he felt were necessary. All this would be a matter of record, so that the appellate court would be able to review fully any alleged errors in the instructions.

Most of the judges who responded to our questionnaire were in favour of permitting the judge to hold a pre-address conference to discuss the charge on the law he intends to give the jury. Representative comments included the following:

> In a jury trial, a counsel is given virtually no opportunity to suggest the proper approach that should be taken to the law in the judge's charge and I cannot understand why input should be denied to counsel as in non-jury cases counsel is permitted to argue his position of law at length. A pre-trial conference would allow all counsel to exchange views with the judge on the law and would likely result in better charges to the juries.

> In fairness to the Crown and the defence, the judge should indicate at least matters that might be in controversy that he intends to include or exclude from his charge and, as officers of the court, counsel should be encouraged to comment, so that all issues upon which the jury must adjudicate are put to them.

> It is extremely important that the trial judge receive all the assistance he can get in regard to his charge; who better to help than those on both sides, who possibly have researched and prepared their cases over the preceding weeks or months.

Timing of Instructions

We gave much consideration to whether having the judge deliver his charge to the jury prior to counsel's argument has any obvious advantages: true, it would permit counsel to refer to the law as stated by the judge in their closing arguments and relate the evidence to it; and, it would permit the jury to evaluate the evidence intelligently as summarized by counsel in light of the law that they will have to apply to it.

The suggestion is that the judge instruct the jury only on the law prior to counsels' address. Following the closing arguments, the judge would then re-state the law and summarize and comment on the evidence, as in the present practice. We rejected this consideration, at last, because: it would protract proceedings unnecessarily; it would serve to present a verbose element of confusion to the minds of the jury; and it might impose a psychological detriment upon the arguments of counsel by seeming to have the judge return to rebut counsel. However, we should welcome readers' opinions about this.

Admittedly, it is extremely difficult for counsel to make an effective closing address to the jury if strictly confined to mentioning the evidence only, and forbidden to mention the applicable law. A few judges do so confine and forbid counsel. However, we have already proposed two possible antidotes for this occasional great difficulty. We have proposed a mandatory preliminary instruction to the newly sworn jury, which instruction includes reference to: a verdict based on the evidence only; the presumption of innocence; burden of proof; reasonable doubt; credibility; and the elements of the crime(s) charged. Such an address at the trial's commencement would surely permit counsel to refer in their closing arguments to the law as stated by the judge. We have also proposed an optional pre-argument conference which, if held, would give the judge ample opportunity to define how far counsel might describe the applicable law to the jury, before counsel could get into difficulty.

Of course the judge must remain the authoritative explainer and interpreter of the law insofar as the jury is

concerned. Our recommendations do not accord to counsel any scope for unsurping the judge's role in this regard. Our recommendations would effect a salutary reform by requiring the judge to have the trial's first word and the trial's last word to the jury.

Objections to the Judge's Instructions on the Law

Under the present law, counsel's failure to object to the charge at trial does not prevent him or her from appealing on the ground that the charge contained a misdirection.[75] However, the court of appeal may consider that counsel did not make a timely objection at trial in determining whether the misdirection caused a substantial wrong or miscarriage of justice requiring a new trial. Counsel's failure to object during the trial is taken to be some evidence that the misdirection was not serious.[76]

Strong arguments can be put forward for the position that a failure to object to a misdirection should result in a waiver of the error for the purposes of appeal. Such a rule would act as a strong incentive for counsel to scrutinize the charge carefully, thereby saving the time and expense of at least some new trials. It would also inhibit counsel, even though he or she suspects a misdirection, from deliberately failing to object to the charge on a gamble that a more favourable verdict will be obtained but if not, a ground for appeal will be preserved.[77]

Two reasons are commonly put forward as justifications for the rule that a misdirection can be raised on appeal even though no objection to it was raised at trial. One argument states that it is the duty of the judge rather than of counsel properly to direct the jury, and that the judge must discharge the duty irrespective of the actions of counsel.[78] The other reason is more substantial. That is, if a serious error were made in the judge's instructions to the jury, the accused's right to appeal should not be irrevocably prejudiced because of the incompetence of counsel. An accused has a right to trial

according to law. These reasons are reflected in the tentative recommendation which actually proposes no change.

While these reasons might justify a rule that the failure of defence counsel to object to the charge at trial ought not to constitute waiver of the accused's right to appeal, different considerations apply with respect to the Crown. If the Crown is successful on appeal in arguing that there has been a misdirection at trial, the accused must undergo a new trial on the same facts. That the accused should not be placed in jeopardy twice for the same matter is, of course, a basic principle of our criminal law. In the words of Rand J. in *Cullen v. The King*:

> It is the supreme invasion of the rights of the individual to subject him by the physical power of the community to a test which may mean the loss of his liberty or his life; and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy.[79]

As Justice Rand further pointed out, "The position of the accused is in sharp contrast to that of the prosecution".[80] The Crown has unlimited resources, while the accused must defend himself in many cases at his own expense. More importantly, the possibility of a new trial can cause the accused grave anxiety, further humiliation and the uncertainty of not being able to plan for his future. The Crown does not bear similarly proportionate detriments when a new trial is ordered. Indeed, in most jurisdictions, the principles underlying the concept of double jeopardy are held in such regard that the prosecution is never able to appeal on acquittal, even on questions of law.[81]

Since the time at which Mr. Justice Rand expressed his opinion, the introduction of legal aid has occurred in Canada. Those who would not diminish the Crown's right of appeal point to the reduction, if not elimination, of financial cost to the accused. Those who would indeed reduce the Crown's right to seek new trials point to the financial cost to the public. The same question is viewed through different optics.

In terms of double jeopardy it may not seem unfair to place a higher burden on the Crown to avoid the possibility of

new trials. Prohibiting the Crown from appealing from a misdirection to which it did not object at trial, and thus for which it did not provide the judge with an opportunity for correction, should do two things. First, it should provide an incentive for the Crown to review carefully the instructions at trial; second, it should prevent the Crown from ignoring errors at trial and taking a chance on a favourable verdict knowing that if a favourable verdict is not returned, it might be able to obtain a new trial on appeal. Despite the form of our earlier tentative recommendation which would preserve the *status quo*, the Commission is divided on this issue, and earnestly seeks readers' opinions about it.

Recommendation 10

Use by the Jury of Written Instructions

The judge may give the jury a written copy of the instructions on the law delivered to them, [and he or she shall do so upon the request of any party made before the jury begins its deliberations or upon the request of any juror made at any time before verdict].

COMMENT

The prevailing practice is not to give the jury a written copy of the instructions on the law to take into the jury room. In our survey of judges, only 6 per cent indicated that they ever "give juries written instructions to take with them to use during their deliberations".

Therefore if, after canvassing the arguments for and against the foregoing proposition, we are to make a similar recommendation to Parliament, we shall require very compelling responses from our readers. There are really two propositions: the first is expressed so as to leave the matter entirely in the judge's discretion; the second, that part expressed between the square brackets, would go further in according to any party or any juror the right to have the judge's

instructions on the law furnished to the jury in writing. What are the relevant arguments?

The case for giving written instructions to the jury was stated by the California Law Revision Commission:

> The instructions are intended to guide the jury's deliberations. Yet, even in a relatively simple case they are usually lengthy and complex. It is hardly reasonable to suppose that the jury, composed as it is of persons unfamiliar with either law or legal language and having heard the instructions but once as given orally by the court, will be able to remember them in detail as it ponders the matters committed to it for decision. Thus, it would seem to be altogether fitting, if not indeed essential, that the jury have a copy of the instructions at hand with which to refresh its recollection as to the issues in the case and the law applicable thereto if it wishes to do so.[82]

Providing the jurors with written copies of the instructions would permit them to concentrate on the charge as a whole during its oral presentation and also reduce the time they spend attempting to recall the charge. Furthermore, since people have varying levels of receptiveness to visual and auditory methods of instructions, those who are more capable of dealing with written instructions would be greatly aided by receiving a copy of the charge. In other words, because of their differing backgrounds and abilities, jurors would be more likely to understand the instructions if they received both oral and written directions.[83] Studies have also shown that the quality of jury deliberation increases when written instructions are used. Jurors spend twice as much time deliberating and applying the rules and are more confident that they have reached the right decision.[84]

In light of what is expressed above it is essential to review the arguments on the other side to see why the practice of giving the jury written instructions has not been widely adopted:[85]

1. It would involve more work for the judge and delay jury deliberations if the judge had to prepare his or her instructions and have them typed in a form suitable to be taken into the jury room. However, this recommendation refers only to the instructions on the law, and, whenever a pre-argument

conference would be held, these might well be settled before the arguments of counsel are presented. This might not allow sufficient time to prepare a written set of instructions for the jury. Some commentators have suggested that if copies of the instructions are not available, oral instructions should be taped in the jury room and played back when and if necessary.[86] This latter suggestion would involve no delay, but one would want to be sure that reliable equipment and facilities would be available everywhere in Canada.

2. If the jurors are given written instructions, they might seize upon one or two passages and consider them out of context or debate their meaning to the exclusion of other issues. However, this danger is just as likely to be present if the jury hears only an oral presentation since they might give undue emphasis to those aspects of the oral presentation which seemed significant to them when they heard the charge and miss the relevance of other instructions or they might forget certain portions completely.

3. Jurors who have an ability to read and interpret writing will have an undue influence in the jury room. Again, this danger seems just as real when the only reference is remembering the oral presentation. Strong-willed jurors are no doubt able to impose their will on others by claiming to have a more accurate recollection of the instruction. However, the written word could be a more effective weapon for a strong-willed hair-splitter than mere recollection.

In those American jurisdictions which have adopted the practice of sending the written instructions on the law into the jury room,[87] these fears have not materialized.[88] Empirical studies confirm the hypothesis that written instructions increase jury understanding.[89] One study found that jurors who were given written instructions engaged in "a more efficient and higher quality deliberative process."[90] Another found that "allowing written instructions in the jury room results in a 12 per cent improvement in jury comprehension."[91] Empirical studies have also shown that jurors would prefer to have written instructions.[92]

The Commission is divided on this issue and seeks to learn the views and experiences of judges, lawyers and former jurors on this vexed question.

B. Summarizing and Commenting on the Evidence

1. Summarizing the Evidence

Recommendation 11

After the close of the evidence and the arguments of counsel, the judge shall fairly, accurately, and impartially summarize the evidence, and the contentions of both the prosecution and the defence. The judge may summarize the evidence in any manner appropriate to the case; but such summary shall relate only to the essential factual questions in issue.

COMMENT

Summarizing the Evidence

Under the present law, at the end of counsel's address to the jury, the judge in most cases has a duty to summarize fairly the evidence to the jury. The standard that is applied in determining whether the trial judge has fairly summarized the evidence is most frequently derived from a quotation by Taschereau J. in *Azoulay v. The Queen*:

> The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them.[93]

The standard of fairness is also frequently derived from a quotation by Spence J. in *Colpitts v The Queen*:

> Recent decisions in this Court and elsewhere have also emphasized the duty of the trial Judge in his charge to go further and to not only outline the theory of the defence but to give to the jury matters of evidence essential in arriving at a just conclusion in reference to that defence.[94]

While the law is not in doubt, the court of appeal cases in which the issue is whether the trial judge has fairly summarized the evidence are legion.

Under the present law, if the issues in a case are clear and the evidence simple, some courts have held that the trial judge does not need to summarize the evidence.[95] However, even in such cases, court of appeal judges have remarked that it would be preferable for the trial judge to summarize the evidence.[96] The recommendation provides that in all cases the trial judge should summarize the evidence.

In most cases the judge will be most effective in assisting the jury by his summary of the evidence if he or she delineates the essential issues and relates the evidence to them. For example, it has been said that, "The function of a trial judge in a charge to the jury is to explain the law relevant to the issues and to relate the evidence thereto in such a manner that the jury is able to appreciate the pivotal issues upon which the case turns."[97] An often repeated statement as to the trial judge's responsibility was made by O'Halloran J.A.:

> The jury has a right to expect from the judge something more than a mere repetition of the evidence. They have a right to expect that his trained legal mind will employ itself in stripping the statement of non-essentials, and in presenting the evidence to them in its proper relation to the matters requiring factual decisions, and directed also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permits.[98]

Thus, while the trial judge does not need to repeat to the jury all the evidence and discrepancies in the evidence (indeed, it might be an error if he or she did, since it might only serve to confuse the jury),[99] he or she must remind them of, and explain to them, the contentions of the parties,[100] and

summarize the essential evidence for them. Normally, the best method of doing this will be for the judge to relate the essential evidence to the important facts in issue. However, in some cases, if he or she feels it will be more understandable to the jury, the judge might adopt some other manner of describing the evidence.

2. Commenting on the Evidence

Recommendation 12

Either during or after summarizing the evidence, the judge may comment upon the weight of the evidence and the credibility of the witnesses. However, if he or she does so, he or she must unequivocably instruct the jury that the jury is the exclusive judge of the facts and that it is not bound by any comments of the judge. In commenting on the evidence, the judge shall not directly express an opinion on the guilt or innocence of the accused or that certain testimony is worthy or unworthy of belief, but may draw to the jury's attention any discrepancies in the evidence which the jury ought to consider in finding its verdict.

COMMENT

Under the present law it is well established that the trial judge has the right to comment upon the credibility of witnesses and the strength of the evidence. In this way he or she is able to give the jury the benefit of his or her experience and expertise in evaluating evidence. The recommendation thus preserves this right in the trial judge.

The recommendation imposes two limitations upon the judge's right to comment on the evidence, the first of which is supported by present case authority, the second of which is

supported at least by dicta in some cases. The first limitation on the judge's right to comment on the evidence is that he or she must make it unequivocably clear to the jury that fact-finding is their function and that they are free to accept or reject his or her opinion on the evaluation of the evidence. This limitation is well recognized in the jurisprudence.[101]

The second limitation imposed by the recommendation is that "the judge may not directly express an opinion on the guilt or innocence of the accused or that certain testimony is worthy or unworthy of belief". A direct expression by the judge that, for example, "I am of the opinion that the accused is guilty" goes beyond the purpose of permitting the judge to comment on the evidence. The purpose of permitting the judge to comment on the weight of the evidence is to provide the jury with the benefit of the judge's insights in evaluating evidence based upon his or her experience. A statement by the judge that in his or her opinion the accused is guilty is of little assistance to the jury in making their own independent assessment of the evidence. In addition it places the judge in the role of an advocate, a role unbecoming to the position. Under the present law an expression of the judge's belief in the accused's guilt would not appear to be absolutely barred; however, some courts of appeal, particularly recently, have spoken disapprovingly of it.[102]

The recommendation would also prohibit the trial judge from making a direct statement that certain testimony is worthy or unworthy of belief. The reasoning described in the above paragraph also applies to this type of comment. The judge can be most helpful to the jury if he or she describes to them the possible factors which might have affected a particular witness' perception, memory, narration or sincerity and which they should consider in determining that witness' credibility. A bald statement that the judge feels a particular witness is or is not worthy of belief is of little assistance to them in making an independent evaluation of the witness' credibility. While under present law judges are permitted to express a direct opinion on a witness' credibility, it is clear that it might be an error if he or she presses such an opinion too strongly.[103]

C. Re-instructing the Jury

Introduction

After the jury retires to deliberate, the judge may discover, or counsel may indicate, that some error was made in the instructions to the jury. Not infrequently, the jury, during the course of their deliberations, may ask the judge for an explanation of some aspect of the instructions on the law. On these occasions, the judge might have to recall the jury from their deliberations and re-instruct them.

Instructions given after the jury has retired are often critical because they will be on important aspects of the law which the jury might have misunderstood or upon which they are focusing. Therefore, the practice governing additional instructions should be clearly settled. This chapter will discuss the problems relating to re-instructing the jury on the law. A subsequent chapter deals with the related problems of reviewing the evidence or testimony at the jury's request.

1. Re-instructing the Jury at Counsel's Request or on the Judge's Own Initiative

Recommendation 13

The judge shall recall the jury and give them additional instructions if the original instructions were ambiguous, erroneous, or unfair.

COMMENT

Under the current practice, the judge invites counsel to object to his charge to the jury after the jury has retired. Defence counsel is normally invited to voice his or her objections first. Common objections to the charge include allegations that the charge: was ambiguous; failed to state or incorrectly stated the relevant law; violated a statutory provision (such as the one prohibiting comment on the accused's failure

to testify); unfairly summarized the evidence; did not relate the evidence to the issues in the case; and did not put the theory of the defence adequately before the jury. If the judge agrees that there has been a misdirection the jury will be recalled and re-instructed. If the judge decides on his or her own initiative that the charge was defective, the jury may also be recalled.

2. The Jury's Request for Re-instruction

Recommendation 14

The judge shall give appropriate additional instructions to the jury at any time after they retire to deliberate if they request additional instructions unless the request concerns matters not in evidence, matters irrelevant to the issues, or matters which by law the jury is not entitled to consider in reaching its verdict.

COMMENT

Occasionally the jury will request further instructions after they have begun their deliberations. Because it is clear that they cannot discharge their responsibilities if they do not understand the judge's instructions on the law, the judge should always attempt to answer their requests for further instructions. However, if the question involves matters not in evidence, matters irrelevant to the issues or matters which by law the jury is not entitled to consider in reaching its verdict, then, of course, the jury's request should not be granted. These factors are largely self-explanatory. The only one which causes any difficulty is the last. Juries, for example, are frequently concerned about the harshness of the sentence which the accused might receive even though they are prohibited from considering the probable nature of the sentence in reaching their verdict. Similarly, the accused and his spouse have the right not to testify and the judge is not allowed to comment on their failure to do so. Thus, if the jury asks questions related to these matters, the judge must explain the law to them and decline to comment.

3. Factors which the Judge Should Consider in Re-instructing the Jury

Recommendation 15

If the judge gives additional instructions to the jury he or she should ensure that undue prominence is not given to the requested instruction. Related instructions should be repeated.

COMMENT

It is the judge's responsibility to instruct the jury on all the law applicable to the case and to ensure that both sides of the case are clear to the jury. An important part of this responsibility is to make sure that subsequent instructions do not tip the balance in favour of one party or the other. In his charge to the jury, the judge should explain that, if it is necessary to give them additional instructions at a later time, for whatever reason, they should treat those directions as part of the original charge and not give undue emphasis to them. This warning should be repeated when the additional instructions are actually given. In order to avoid giving undue emphasis to one aspect of the law which might tend to favour one party, the trial judge, in re-instructing the jury, should place all his comments in the context of the law as a whole. The judge should include in the re-instruction any related, companion instructions which should be considered in connection with the actually requested instructions.

4. Procedure for Re-instructing

Recommendation 16

If the jury requests re-instruction it shall be conducted back into the courtroom where its request can be given on the record, in the presence of the accused and counsel. Before the judge re-instructs the jury he shall advise counsel what additional instructions he intends to give and

afford counsel an opportunity to object. [The court may, if it deems it appropriate, where for example a new or different principle of law is contained in the re-instructions, permit counsel to make additional arguments.]

COMMENT

If the judge re-instructs the jury the same procedural protection and the same rights to object should obviously be given to the parties as were given to them with respect to the original instruction. The re-instructions are as important to their case as the original instructions.

A more contentious issue, expressed between the square brackets, is whether counsel should be permitted to present additional arguments following the re-instruction. In Canada, it does not appear to be open to counsel to make submissions to the jury in respect of points raised in subsequent instructions to the jury. In the United States, by contrast, counsel have the right to present additional argument on any new or different principles of law contained in the subsequent instructions providing that they make a timely assertion of this right. It is generally held to be a prejudicial error to deny counsel the opportunity to make additional argument, although a few cases hold that the trial judge has the discretion to rule on whether additional argument is necessary.[104]

There are two major arguments against permitting counsel to submit additional arguments to the jury. First, such arguments would lengthen the time needed to re-instruct the jury and might confuse the jury. This objection cannot be met by giving the judge the power to reject arguments which he feels are only a reiteration of previously made points or are an attempt to explain such points in a different way. That would neither limit nor simplify proceedings.

Second, it could also be argued that additional presentations by counsel are not necessary at this stage, because counsel have already had an opportunity of making submissions to the jury after the judge's original instructions. But if

the judge's additional instructions to the jury contain new points which are relevant to the determination of the case, it would mean that the case had been effectively re-opened to include these issues, but without counsel being given an opportunity to speak to them. Is this contrary to the basic principles of the adversary system? Does it place an unfair burden on the judge since he is responsible for presenting to the jury a summary of the evidence, as well as the law, relevant to that aspect of the case? Could permitting additional argument not unduly lengthen or confuse the case? Would it aid the jury in understanding the additional instructions? We earnestly solicit the comments of interested readers.

D. Instructing the Jury about Unanimity

Recommendation 17

17.1. A standard instruction should be prepared informing jurors of their responsibility to deliberate with a view to reaching agreement while exercising their individual judgment. The instruction should be consistent with the following guidelines:

(*a*) that in order to return a verdict the jury must be unanimous; each juror must agree with it;

(*b*) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to their individual judgment;

(*c*) that in the course of deliberations, jurors should not hesitate to re-examine their own views and change their opinion if they become convinced that it is erroneous;

(*d*) that if, after full and impartial consideration of the evidence with the other jurors, in light of the directions received on the law, a juror is unable conscientiously to accept the view of the other jurors, he or she has the

right and indeed the obligation to disagree with the other jurors, whether he or she is a member of the majority or minority; he or she should not surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict;

(*e*) that no instruction should be given which is directed solely at the minority;

(*f*) that no instruction should be given which implies the jury is not discharging its function if it does not reach a verdict.

17.2. If the jury returns and informs the court that it is unable to agree, the judge may repeat the instructions recommended above and require it to continue its deliberations if there is a reasonable prospect of agreement.

17.3. If, after the jury has deliberated for a reasonable period of time, the judge thinks that it may be assisted by further instruction on unanimity, he or she may recall it and repeat the standard instructions recommended above.

17.4. The judge shall discharge a jury which, after deliberating for a reasonable period of time, has not agreed upon a verdict if there appears to be no reasonable prospect of agreement.

COMMENT

We comment upon each of these recommendations separately.

17.1. A standard instruction should be prepared informing jurors of their responsibility to deliberate with a view to reaching agreement while exercising their individual judgment.

COMMENT

One of the difficult questions facing a judge in instructing the jury is the extent to which they should be encouraged to agree on a verdict. On the one hand, because of the costs of a deadlocked jury, jurors should be encouraged to reach a verdict. On the other hand, the unanimity requirement demands that the verdict of the jury reflect the opinion of each individual juror. There is a danger that the judge may use his or her authority to coerce individual jurors to agree with the majority for the sake of reaching a verdict, even if the verdict is against their conscientious beliefs.

The major problem with hung juries is that the cases in which they occur must be retried. This doubles the emotional and financial strain on the accused, increases the costs borne by the taxpayer, delays the administration of justice, and results in extra congestion of the courts. Because of these substantial disadvantages, the judge is justified in taking some steps to encourage the jury to reach an agreement.

However, undue pressure to return a verdict should not be placed on the jury, since a hung jury is as much a part of a jury system requiring unanimity as is an acquittal or conviction. The accused has the right to rely on the possibility of a jury disagreement. In fact, a hung jury is a vital safeguard to an accused's rights. Of course, if an accused could know that the jury deadlocked with a large majority favouring acquittal, those rights might seem ephemeral in such circumstances. If the standard of proof beyond a reasonable doubt is to be maintained, the hung jury must be allowed to continue as a possible result in a jury trial. Judges should not feel obliged to brow-beat juries into returning unanimous verdicts in cases where the evidence has failed to convince all twelve of the jurors beyond a reasonable doubt.

While coercion to agree may take place in the initial charge, the danger is particularly acute in the situation where the jury has deliberated for some length of time and has returned to the courtroom to announce they are deadlocked. In this situation judges frequently give the jury supplementary

charges and ask them to return to the juryroom and continue deliberating in an effort to reach agreement. The purpose of any charge on reaching agreement must be to prod the jury into fruitful deliberation leading to a unanimous verdict. It must not coerce a minority juror to vote against his or her conscience.

Under the present law, appeal courts will review each charge in which it is alleged that the trial judge's instruction to the jury was coercive. This case-by-case analysis of the language used in the instructions is unsatisfactory. The coercive impact of the instructions given in particular cases can almost never be proved. Courts are therefore left with resorting to drawing questionable inferences from a number of facts in each case. Direct evidence of coercion is, of course, impossible to obtain because jurors cannot be asked why they changed their positions. Because the accused convicted by a jury has no adequate means of demonstrating the coercive impact of particular instructions to the jury, courts of appeal will seldom order a new trial on this ground.

We therefore recommend that a standard instruction be given to the jury on the question of unanimity. The uniformity gained from such a guideline should reduce the number of appeals generated, and reduce the possibility of prejudice to the defendant.[105] The following general standards should be followed in drafting this model instruction:

> ***The instruction should be consistent with the following guidelines:***
>
> > **(*a*) that in order to return a verdict the jury must be unanimous; each juror must agree with it;**

COMMENT

It cannot be assumed that the jury will realize that it must return a unanimous verdict. Therefore, the caution in the above recommendation is an essential element of the judge's

closing charge. Under the present law a failure by the judge to tell the jury they must be unanimous will result in a new trial.[106]

> **(*b*) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to their individual judgment;**
>
> **(*c*) that in the course of deliberations, jurors should not hesitate to re-examine their own views and change their opinion if they become convinced that it is erroneous;**
>
> **(*d*) that if, after full and impartial consideration of the evidence with the other jurors, in light of the directions received on the law, a juror is unable conscientiously to accept the views of other jurors, he or she has the right and indeed the obligation to disagree with the other jurors, whether he or she is a member of the majority or minority; he or she should not surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict;**

COMMENT

Under the present law the judge must not use words in instructing the jury from which the jurors might infer that they are required to agree on a verdict. In a leading case on this issue, the following instruction was given by the trial judge to the jury: "This is an important case and you must agree upon a verdict. This means that you must be unanimous." Justice Fauteux pointed out that this form of instruction was irregular as it might be open to the construction that there was an obligation to agree upon a verdict.[107]

However, there is no obligation upon a judge to explain to a jury that they may disagree[108] so long as the jury is not left with the impression that it must agree.[109]

Various members of the Ontario Court of Appeal have, however, indicated that, although it is not necessary to instruct the jury that they may disagree, it is nevertheless good practice to do so.[110]

The reasons given for not instructing juries on their right to disagree are that such an instruction will only encourage disagreement, and that juries in any event will always advise the court if they cannot agree. However, it cannot be assumed that lay people know how the jury system is supposed to operate, and unless they are told that they may disagree, they may get the impression that the trial will not end until agreement is reached. Furthermore, if jurors are told to consult with each other and attempt to reach a verdict, informing them in explicit language of their right to disagree should not result in a great number of hung juries. To the extent it does, it is a good thing because it would mean that under the present practice some jurors are agreeing because they feel they have to, or because they are being coerced.

To avoid the danger of encouraging juries to disagree, emphasis should be placed on the duties and responsibilities which the jury must discharge, rather than on the right to disagree. Disagreement should be presented as an alternative which becomes possible only after both definitive verdicts have been considered by the jury as a whole and rejected by one or more members on the basis of honest and conscientious objections. The instruction should attempt to encourage the jury to engage in fruitful dialogue and a searching examination of the evidence. The above recommended guidelines embody these objectives.

> **(*e*) that no instruction should be given which is directed solely at the minority;**

COMMENT

Occasionally some judges exhort the jury to reach a verdict by comments directed at the minority urging them to reconsider their position in light of the views of the majority of their fellow jurors.[111]

This kind of exhortation for unanimity has traditionally been upheld in Canadian courts. Indeed, it has even been stated that the trial judge has a duty to exhort the jury to agree.[112] The English case of *Shoukatallie v. The Queen*[113] is frequently relied on in this regard by Canadian judges.

While a reminder to the minority jurors to re-examine their opinions might be only common sense advice, it is also highly coercive. Indeed, it is such common sense for a person who is outnumbered to re-examine his or her opinion that one can assume that jurors will do it without gratuitous advice to do so from the judge. The effect of such an instruction by the judge, rather than simply alerting the jury to a common sense notion, is undoubtedly to place enormous pressure on the minority to acquiesce in the majority's opinion. From the instruction, the jury might well conclude that the judge wants a verdict and that the majority's verdict is sufficient. At the very least, an instruction directed at the minority which emphasizes reaching a verdict, implies that the majority is right and tempts the minority to submit.

> **(*f*) that no instruction should be given which implies the jury is not discharging its function if it does not reach a verdict.**

COMMENT

Another common means by which judges encourage deadlocked juries to reach a verdict is through comments which, directly or by implication, suggest that a jury which cannot agree on a conviction or an acquittal is not properly discharging its function.

Exhortations of this nature are objectionable on several grounds. First, they ignore the fact that a hung jury is as much a part of a system premised upon the doctrine of reasonable doubt as is an acquittal or conviction. Second, they imply that a jury which cannot reach a verdict is either stupid or is not approaching its task with sufficient seriousness. On the con-

trary, the available evidence reveals that jurors perform their duties diligently and conscientiously.

In summary, while the jurisprudence suggests that it is improper for the trial judge to coerce the jury into reaching a verdict, the standard applied in determining whether unanimity has been coerced would appear to be far too liberal. The recommended guidelines for drafting an instruction on unanimity should achieve a more equitable balance of the conflicting interests.

17.2. If the jury returns and says they are unable to agree, the judge may repeat the instructions recommended above and require them to continue their deliberations if there is a reasonable prospect of agreement.

COMMENT

It is a well accepted present practice to require the jury to continue deliberating even after it has indicated that it cannot agree, if the judge believes that there is a possibility of agreement. Some commentators, however, have argued that if the jury returns and says they are unable to agree they should be discharged. If the jury returns deadlocked, it can be assumed that after sincere efforts they were unable to reach agreement. Their failure to agree indicates that the evidence leaves the jury with divergent conclusions as to acquittal or conviction. Any effort to send them back for further deliberation will be inherently coercive on the minority. On the other hand, some cases may be sufficiently complex, and the period of deliberation so short, that the judge would have a valid reason for assuming that the jury did not engage in frank and sincere deliberations. He should therefore send them back in an effort to provoke a meaningful deliberative process.

When instructing the deadlocked jury on unanimity, the judge should only repeat the original instructions. There is no justification at this stage to give an instruction that could be more coercive than the first. Indeed, extra precaution should

be taken since the minority in this situation might be particularly subject to coercion.

17.3. If, after the jury has deliberated a reasonable period of time, the judge thinks that it may be assisted by a further instruction on unanimity, he or she may recall the jury and repeat the standard instructions recommended above.

COMMENT

It might be thought particularly coercive for a judge to recall a jury on his or her own initiative for the purpose of giving further instructions on unanimity. In fact, however, if the original charge, which urges the jury to engage in fruitful dialogue and a searching examination of the evidence without surrendering their individual convictions, is merely repeated, the supplemental charge may actually reinforce the position of the juror or jurors who cannot in good conscience agree with the majority. The possible coercive impact of such instructions will be minimized if they are not aimed at the minority and do not imply that the jury has a duty to reach a verdict. The purpose of such additional instructions is to encourage the jury to engage in fruitful dialogue.

17.4. The judge shall discharge a jury which, after deliberating for a reasonable period of time, has not agreed upon a verdict if it appears that there is no reasonable prospect of agreement.

COMMENT

This recommendation simply restates the present law.

VII

Special Procedures during Trial

A. Juror Note-taking

Recommendation 18

Jurors may be provided with the facilities to take notes during the trial. They may take notes regarding the evidence presented to them and keep these notes with them when they retire for their deliberations. Such notes shall be treated as confidential between the juror making them and the other jurors.

COMMENT

The present practice with respect to note-taking by jurors varies from province to province and even from court to court. Some judges discourage jurors from taking notes, others permit them to take notes if they request permission to do so, and some let them take notes as a matter of right. In Alberta, all jurors are provided with pads and pencils at the outset of the trial and invited to take notes. Interestingly, in our survey of jurors a substantial proportion of the jurors in all jurisdictions except for Toronto and Brandon perceived that they were allowed to take notes during the trial.

Permitting jurors to take notes would appear to be an obvious way of lessening jury confusion and furthering the

purposes of jury trial. Not only would jurors be able to make brief notes of the salient testimony and thus be able to recall it more accurately by association, but also in complicated trials it would permit them to keep track more accurately of times, names and places. Furthermore, for many jurors permission to take notes should diminish the strangeness of the courtroom.

In our survey of jurors approximately 48 per cent of those who perceived that they were not allowed to take notes, would have liked to have been able to do so.

Three arguments are sometimes advanced against jury note-taking:

1. The juror who has taken extensive notes will create the impression that he or she is more alert and informed than the others and will thus exert an undue influence over other jurors during the deliberations; at least, it is contended, if there is a dispute about the evidence in the jury room, jurors will tend to defer to the note-taker.

While this argument might have had some weight when a substantial number of jurors were illiterate, nowadays when virtually all jurors are literate and most of them are likely to take, or are capable of taking, notes, the danger suggested in the argument seems minimal. Moreover, the danger that the intelligent appearing or sounding juror will exert an undue influence over other jurors is present whether or not notes are taken. The present system gives the advantage to the juror who purports to have the best memory. Indeed, note-taking is likely to reduce this danger since the forceful juror is less likely to influence jurors who have their own notes in front of them. Finally, at present, when during the jury's deliberations disputes arise about the evidence which cannot be resolved, the jury returns to the courtroom to have the evidence reviewed. It seems likely that this would continue to happen even if one juror purported to have notes on the point. Indeed, the judge could instruct the jury prior to their retirement to deliberate that this is the proper course of action.

2. The second argument against note-taking is that jurors might take down trivial details and overlook important facts.

Judges, by comparison, so the argument goes, are likely to be much more skilled at note-taking and in a better position to take intelligent notes because they will be aware at the outset of the trial of the factual issues in dispute and of their significance.

The danger that a juror will give undue weight to an aspect of the evidence might be realized whether or not he or she is taking notes. During the deliberation, the collective recall of the jury and the give-and-take of discussion should ensure that a balanced view is taken on the evidence. Moreover, the fact that the judge might be a better note-taker than jurors would not appear to be a reason to deny the jury the privilege altogether. Note-taking is not put forward as a means of ensuring that the jury rationally assesses the evidence; it might, however, marginally assist some jurors in recalling and evaluating the testimony. Finally, the lawyers' summation of their arguments and the judge's charge to the jury, should correct any tendency a juror might have to unduly emphasize a particular point simply because he or she has it in writing.

3. If jurors are busy taking notes they might be distracted from observing the demeanor of the witness or they might be diverted from some important testimony given while they are busy taking notes.

The likelihood that a juror will ignore or not hear some testimony for whatever reason reveals one of the strengths of a jury of twelve members. What one juror assumes is not important or overlooks, another juror is likely to recall and evaluate critically. Furthermore, an assumption which is just as plausible is that note-taking will concentrate their attention on important testimony.

Thus the traditional arguments against juror note-taking would no longer appear to be decisive. The present practice of not permitting jurors to take notes is by and large a relic of the days when jurors were illiterate. It is illogical that in some cases jurors should be the only ones in the courtroom not entitled to take notes. Allowing them to take notes re-affirms our trust in their good sense and intelligence.

If note-taking is permitted, an American judge has suggested that three worthwhile precautions should be observed. These precautions are by and large embodied in our recommendations:

> First, all jurors should have equal opportunity although none should be required to take notes against their will. The trial judge may permit the distribution of a pencil and pad to each juror to guarantee equality of opportunity, even though some may use them only to doodle.
>
> Second, jurors should be assured of the confidentiality of their notes. The subject matter of their notes should be revealed only in the privacy of the deliberations of the jury, and only then when the juror with notes elects to disclose them.
>
> Third, the jurors should be admonished to be as tolerant of the notes of another as they should be of another's independent recollection of the proceedings. After all, there is no magic in note-taking. The percentage of reversible error in cases tried by a judge will probably run about the same for the cases in which he takes notes as those in which he doesn't.[113]

B. Questions Asked by a Juror during the Trial

Recommendation 19

Jurors, if they wish to ask a question of a witness, should be instructed to wait until counsel have finished their questioning of the witness. They should then put their question in writing and hand it to the judge who will rule on whether the question is a proper one. They should also be told, however, that the judicial trial is an adversary proceeding, and that normally the conduct of the case is left entirely to the parties. Only in exceptional circumstances should the trier of fact intervene in any way.

COMMENT

The present practices with respect to a juror asking questions of a witness appear to vary greatly. About one-half of the judges (53 per cent) that we surveyed indicated that they

allow jurors to ask questions during the trial. In most of those cases, the judges indicated that the questions would be screened before they were asked. Our survey of jurors revealed that most jurors did not feel that they had a right to ask questions of the witnesses during the trial. A majority (57 per cent) of those who perceived that they were not allowed to ask questions of the witnesses indicated that they would have liked to have been able to do so.

Permitting jurors to ask questions during the trial would undoubtedly enable them in some cases to increase their understanding of the evidence and testimony. Several empirical studies confirm the common sense notion that being permitted to ask questions of a person communicating information greatly enhances the probability that the message being communicated will be properly understood.[115] An expert who has studied the differences in the context of a jury trial between one-way communication (the jury is unable to ask questions) and two-way communication (the jury is able to ask questions) concluded that:

1. However clear a witness or lawyer may be in his own mind about the information he seeks to communicate to the jury, it follows from the very nature of one-way communication that except in the case of very simple messages the information as received is bound to be distorted;

2. Gaps or omissions in the evidence, even though highly relevant to a proper determination of the issues, cannot be remedied under conditions of one-way communication; and

3. The jury's seeming lack of power to seek corrective or supplementary information encourages speculation about matters which are without adequate factual basis or otherwise inappropriate for jury consideration. Questioning by the jurors during the course of the trial would tend to pinpoint such areas of improper speculation and enable the trial judge to neutralize the effects by appropriate admonition.[116]

The difficulties with permitting jurors to ask questions during the trial include the problem that they might disrupt the orderly presentation of counsel's examination of witnesses or that they might ask questions which involve inadmissible evidence. However, the procedural protections recommended should ensure that these difficulties do not arise. First, jurors should be cautioned about their role in the trial and the fact that in an adversary proceeding the main responsibility for eliciting evidence must rest upon counsel. Second, they should be told that if they have any questions to ask a witness they should wait until counsel have finished their examination of the witness. Finally, if a juror wishes to ask a question, the question should be put in writing and handed to the judge who, in consultation with counsel,[117] should rule whether the question will be permitted to be asked of the witness.

C. Continuance of Trial in Absence of One or More of the Jurors

Recommendation 20

20.1. Where in the course of a trial the judge is satisfied that a juror should not, because of illness or other reasonable cause, continue to act, the judge may discharge the juror.

20.2. Where in the course of a trial a member of the jury dies or is discharged pursuant to subsection (1), the jury shall, unless the judge otherwise directs and if the number of jurors is not reduced below ten, or in the Yukon Territory and the Northwest Territories below five, be deemed to remain properly constituted for all purposes of the trial, which shall proceed, and a verdict may be given accordingly.

COMMENT

This section is identical to section 573 of the *Criminal Code*. "Other reasonable cause" would include a cir-

cumstance where, for example, disclosure of facts during the trial lead the judge to believe a particular juror could not give an impartial verdict because, for example, it turned out that the juror was related to a witness.

In some jurisdictions in the United States alternate jurors (sometimes as many as four) are sworn in long trials. If a regular juror, for whatever reason, is unable to continue, an alternate juror takes his or her place. Thus the number of jurors never falls below twelve. However, the burden of requiring extra jurors to sit through long trials and the possibility that alternate jurors, because they may not have to deliberate in the case, will not pay close attention to the evidence, appear to be sufficient reasons for not adopting the American law.

VIII

Jury Deliberations

A. Materials in the Jury Room

Recommendation 21

21.1. Material the jury is not entitled to take with it to the jury room.

Upon retiring for deliberation, the jury is not entitled to take with it:

(*a*) materials which have not been admitted into evidence except as provided in subsection 2(*e*);

(*b*) annotated criminal codes or any other law books.

21.2. Material the jury is entitled to take with it to the jury room.

Upon retiring for deliberation, the jury is entitled to take with it:

(*a*) notes of the testimony or other aspects of the proceedings taken by the jurors themselves;

(*b*) a copy of that part of the relevant sections of the *Criminal Code* or other statutes which define the offence or offences with which the accused is charged;

(*c*) a copy of the judge's instructions on the law, if any has been furnished;

(*d*) a copy of the charges against the accused which the jury is trying;

(*e*) any other material which is placed on the record and which the judge considers will assist the jury in reaching a proper verdict.

21.3. Materials the jury is normally entitled to take with it to the Jury Room:

(*a*) upon retiring for deliberations, the jury should normally be entitled to take with it all exhibits which have been received into evidence [except those mentioned in section 4]. (See note preceding *21.4* below.)

(*b*) in determining whether a particular exhibit should not be taken to the jury room, the judge shall weigh the probability that the material will assist the jury in reaching a proper verdict against the danger that the jury will (i) misuse the material, (ii) be confused or misled by it, or (iii) become prejudiced against one of the parties because of the presence, appearance, or graphic over-emphasis of the contents of the material.

Note: *The proposals which follow, shown within square brackets, have been received and considered by the Commission. Although the Commission is not prepared to propose them as tentative recommendations at this time, those proposals with their supporting arguments are nevertheless published here for purposes of eliciting discussion and response from our readers.*

[21.4. Materials the jury is normally not entitled to take with it to the jury room:

(a) upon retiring for deliberation, the jury should normally not be entitled to take with it any written or recorded statements which have been introduced into

evidence, or any written portion of the testimony or other facts of the proceedings;

(b) in determining whether a matter mentioned in subsection (a) should be taken to the jury room the judge shall weigh the probability that the material will assist the jury in reaching a proper verdict against the danger that the jury will be confused or misled by it and the inadequacy of the normal procedure of having the jury return to the courtroom to review the transcript of the evidence.]

COMMENT

Introduction

When the jury has heard all of the evidence, the closing arguments by counsel, the instructions on the law, and the summary and comments on the evidence by the trial judge, it then must retire to the jury room to deliberate and reach a verdict. During its deliberation it is expected to recall all the evidence, properly assess its weight and then determine the facts of the case. It must then apply the law, as instructed by the judge, to the facts and return with its verdict. The quality of the jury's deliberations is thus critical if the jury is to reach a fair and rational decision. Many of the chapters in this study relate directly to jury deliberations: how jury size affects deliberations; how the requirement of unanimous verdicts affects deliberations; how the judge's instructions affect deliberations; how the use of written notes taken by individual jurors affects deliberations; and, how the make-up of the jury, in terms of the individuals on it, affects its deliberations. In this chapter we consider how materials which the jury could take into the jury room might affect its deliberations. In particular, we consider a number of materials about which there is often some dispute as to whether the jury can take them into the jury room for reference or assistance during their deliberations.

Whether the jury should be able to take a particular matter into the jury room should depend upon whether the

presence of the matter would improve the quality of its decision-making. This involves a consideration of such questions as whether the matter would aid the jury in recalling or evaluating the evidence; whether it might lead the jury to decide the case on an improper basis by confusing or misleading the jury or prejudicing it against a party; whether the matter might be improperly used by the jurors; whether the matter suggests facts which were not led in evidence at trial and of which the jury is not entitled to take judicial notice; and, whether the materials might lead the jury to believe that the law to be applied in the case is something other than that expressed by the judge.

21.1. Material the jury is not entitled to take with it to the jury room.

When retiring for deliberation, the jury is not entitled to take with it:

(*a*) materials which have not been admitted into evidence except as provided in paragraph 2(*e*);

COMMENT

It is clear that under the present law, materials which have not been admitted into evidence must not be taken into the jury room when the jury retires. This prohibition includes evidence which the trial judge has ruled inadmissible[118] and materials that have been referred to during the course of the trial but not admitted into evidence.[119]

The reasons for this rule are found in the principle underlying the adversary system. The accused has the right to be present in court during the whole of his trial, and to have the verdict based only on the evidence adduced at trial. This principle would be violated if the jury were allowed to consider material in the jury room which had not been introduced into evidence at trial. Furthermore, it would have the effect of

re-opening the case without giving either adversary a chance to object or respond to the new evidence.

(*b*) Annotated criminal codes or any other law books.

COMMENT

Under the present law, the jury is not permitted to take into the jury room any legal texts, including annotated *Criminal Codes*.[120] This practice is salutary for at least two reasons. First, the jury is required to accept the law as it is described to them by the judge. They are not to interpret the judge's statements on their own or decide that another charge might have been more appropriate. Supplying the jury with legal textbooks might encourage them to substitute the author's interpretation for the judge's or to form their own opinions on legal principles. Second, one of the basic principles of the adversary system is that both sides have the right to present arguments on the interpretation of the law to be applied to the case. To permit the jury to consider in the confines of the jury room, the interpretation of the law to be applied, would be an obvious breach of this principle.

21.2. Material the jury is entitled to take with it to the jury room.

Upon retiring for deliberation, the jury is entitled to take with it:

(*a*) notes of the testimony or other aspects of the proceedings taken by itself;

COMMENT

Jurors should be entitled to take into the jury room any notes they might have taken during the trial, otherwise the purposes of permitting jurors to take notes would be defeated. For a discussion of juror note-taking see Chapter VII, Juror Note-Taking.

(*b*) a copy of that part of the relevant sections of the *Criminal Code* or other statutes which define the offence or offences with which the accused is charged;

COMMENT

At present, the courts of appeal of the provinces are split on the question of whether a section of the *Criminal Code* may be taken by the jury into the jury room.[121] The issue was thoroughly considered by the Ontario Court of Appeal in 1975.[122] In holding that it was not an error for the trial judge to give the jury relevant sections of the *Criminal Code*, the Court stated, *per curiam*:

> There are many cases in which the charge must contain instructions as to a number of sections of the Criminal Code. In such cases it might be helpful to the jury to have copies of the sections as an aid to recalling accurately the numerous elements of the sections to which they had been referred by the trial judge in his charge. Accordingly, we are not prepared to say that a trial judge must not provide copies of sections of the *Criminal Code* to a jury. Each case will depend upon its own circumstances. The more complicated the issues the more likely is the jury to request copies of the sections of the Code to assist them; and the more likely is the trial judge to decide that copies of the relevant sections of the Code may assist the jury in their difficult task.[123]

The Court went on, however, and stated that the jury should be carefully instructed as to the limited use they may make of such material:

> In any case in which copies of sections of the *Criminal Code* or related statutes are provided, the jury must be carefully instructed as to the limited use which can be made of them, and reminded in the clearest terms that they must accept the law as it has been given to them in the charge and are not to engage in their own interpretation of the sections.[124]

For the reasons given by the Ontario Court of Appeal, we recommend that the juries be given copies of the relevant sections of the *Criminal Code*. Particularly if the case is complex and involves a number of legal issues, this should assist the jury in recalling the law to be applied in the case. Naturally, only those sections relevant in the case should be given

to the jury, and only that part of the relevant section that deals with the definition of the offence. The objection that this practice might encourage the jury to interpret the law themselves can be overcome by an instruction to the jury that such sections are only to be used as aids in remembering and understanding the judge's instruction on the law. Indeed, such instruction on the law must be specific according to the Manitoba Court of Appeal in a recent case.[125] Furthermore, any danger of misconstruction would be reduced if, written copies of the judge's instructions could also be given to the jury. Indeed, those instructions might often contain within them a verbatim reproduction of the relevant *Criminal Code* sections.

It might also be argued that juries will be more hesitant to ask for further instructions on an issue than they would if they had not been given the written statutory definition of the offence and the relevant defences. However, if juries are allowed to have copies of the judge's instructions, this situation is unlikely to arise. And if it does, there is no reason to believe that if a jury is told it may return and ask the judge for clarification on a point about which jurors are in doubt, it will not do so.

> **(*c*) a copy of the judge's instructions on the law, if any has been furnished;**

COMMENT

In the chapter on the Judge's instruction on the law we posed the question about whether the jury ought to be given *written* copies of such instruction. See Chapter VI, Part A, Section 3.

> **(*d*) a copy of the charges against the accused which the jury is trying;**

COMMENT

There is general agreement among the courts that the jury is entitled to examine a copy of the indictment in the jury

room. Even in a case in which the indictment included several charges of a similar character, some of which had already been tried and a verdict of guilty endorsed on the indictment, it was held not to constitute a reversible error to give a copy of the indictment to the jury.[126] This decision appeared to turn on the fact that the prior convictions would almost of necessity have been known to all the jurors whose names were on the panel for the court's sittings. The Court pointed out that the better practice would have been to supply the jury with a copy of the indictment which excluded the endorsements of the verdicts in the previous trials.[127] The Supreme Court of Canada has held, however, that while the jury can be given a copy of the indictment, it is reversible error to provide the jury with an indictment upon which the conviction of the accused at a previous trial of the same charge is endorsed.[128] Chief Justice Duff was of the opinion that "a copy of the indictment with the endorsement omitted would have served every legitimate purpose."[129]

The recommendation thus restates the present law: the jury can be given a copy of the indictment, indeed it has a right to see it; however, all irrelevant information must be removed from it.

> **(*e*) any other material which is placed on the record and which the judge considers will assist the jury in reaching a proper verdict.**

COMMENT

The parties and the judge might agree that certain diagrams or summaries of the relationships between the parties, for example, would be useful to the jury in the course of their deliberations. If so, there would appear to be no valid objection to permitting the jury to use such material, provided, of course, that it becomes part of the record.

21.3. Materials the jury is normally entitled to take with it to the jury room:

(*a*) upon retiring for deliberations, the jury should normally be entitled to take with it all exhibits which have been received into evidence [except those mentioned in section 4.] (See note preceding section *21.4* above, page 124);

(*b*) in determining whether a particular exhibit should not be taken to the jury room, the judge shall weigh the probability that the material will assist the jury in reaching a proper verdict against the danger that the jury will (i) misuse the material, (ii) be confused or misled by it, or (iii) become prejudiced against one of the parties because of the presence, appearance, or graphic over-emphasis of the contents of the material.

COMMENT

Under the early common law no papers could be taken into the jury room except letters patent and exemplified copies of deeds. The reason for the exception was that only these documents had "intrinsic credit".[130] By practice, all papers and exhibits admitted into evidence may be taken with the jury upon its retirement. However, there are very few cases on this issue in Canada and the present law would, therefore, appear to be in a state of uncertainty.[131]

Permitting the jury to take into the jury room such matters that have been admitted into evidence as pictures, maps, guns, X-ray plates and other physical objects might assist them in their deliberations. By examining certain exhibits while deliberating, the jury might be able better to review, understand, and weigh the evidence. For example, in a murder case it may be essential for the jury to understand how the murder weapon worked. They might have difficulty following a detailed explanation of the mechanics involved, but could use the weapon as a model when reviewing the explanation in the jury room.[132] Therefore, exhibits should generally be available for the jury's use.

In some cases, however, permitting exhibits to be sent to the jury room might lead the jury to decide the case on an

improper basis. For example, the jury may be misled by a close examination of the material or use the material to conduct their own experiments and decide the case on the basis of their results, rather than on the evidence adduced at trial. This, of course, would violate one of the basic tenets of the adversary system, the right to have evidence presented and tested in open court.

Another danger which might arise if certain materials are sent to the jury room is that the material might unduly prejudice the jury. A gruesome photograph or bloody clothing, for example, might be admitted into evidence because it has some essential probative value, even though it might prejudice the jury. However, the presence of the exhibit in the jury room, while it might be of little assistance to the jury in rationally evaluating its probative value, might greatly increase its prejudicial effect. Furthermore, there is a possibility that certain exhibits might lead the jury to place unwarranted emphasis on one aspect of the case. Therefore, the judge should have a discretion to refuse to permit the jury to take exhibits into the jury room if their value to the jury in reaching a proper verdict is outweighed by the danger that the jury might make improper use of the material, be confused or misled by it, or become unduly prejudiced against one of the parties.

In deciding whether to permit an object to be taken to the jury room, the judge should also consider whether its potential misuse, for example, could be minimized by giving the jury strict instructions as to the limited use which they can make of the exhibit.

[21.4. Materials the Jury is normally not entitled to take with it to the jury room:

(a) upon retiring for deliberation, the jury should normally not be entitled to take with it any written or recorded statements which have been introduced into evidence, or any written portion of the testimony or other facts of the proceedings; . . .]

(See note preceding section *21.4* above, page 124)

COMMENT

In deciding whether the jury should be given a transcript of the trial, there is probably no reason to distinguish between a transcript of the lawyer's closing arguments, the judge's charge and the evidence of the witnesses. The jury is entitled to consider all of these statements in reaching its verdict. The purpose of providing the jury with a transcript would be to permit jurors to refresh their memories as to what was said. The danger that arises if a transcript is given to the jury would appear to be the same in each case: that the jury might give undue emphasis to the parts of the transcript it was given. On the other hand, the official transcript would be, at least, as accurate and complete as the juror's own notes, if any.

The present law as to whether the jury should or can be provided with transcripts is uncertain. However, all of the cases are in agreement that if part of a transcript is given to the jury, other related testimony must also be provided to ensure that the jury does not give undue emphasis to only part of a witness' testimony.[133] However, there are dangers in giving the jury even all of the relevant testimony on a particular point. For example, there is no guarantee that the jurors will review all of the testimony, but rather might read only that part they specifically requested. Thus, they may give greater emphasis to that particular aspect of the case than it deserves. There is also the practical problem that where the transcript is given to the jury, it will have to be transcribed and twelve copies will have to be prepared. If twelve copies are not prepared, one juror will have to read out all of the testimony. This juror may unintentionally or intentionally misread part of the transcript, and would very likely read much superfluous testimony. Requiring the jury to return and the judge to read out in the presence of counsel the relevant testimony in an impartial and thorough manner is a simple and obvious safeguard against these possible dangers. It is also a much more convenient, reliable and, in most cases, quicker method of refreshing jurors' memories than allowing them to retire to the jury room with a trial transcript. See the chapter on Reviewing the Evidence.

For these reasons, normally the jury should not be given a transcript of the testimony. However, to cover the exceptional case in which the judge may decide it would be helpful to the jury to have a copy of the transcript, the recommendation is made permissive.

> [. . . ***(b) in determining whether a matter mentioned in subsection (a) should be taken to the jury room the judge shall weigh the probability that the material will assist the jury in reaching a proper verdict against the danger that the jury will be confused or misled by it and the inadequacy of the normal procedure of having the jury return to the courtroom to review the transcript of the evidence.***]
>
> (See note preceding section *21.4* above, page 124)

COMMENT

Written statements, including depositions and statements by the accused, are often introduced into evidence because they come within one of the exceptions to the hearsay rule. There is little authority in Canada as to whether those statements should be given to the jury. The British Columbia Court of Appeal has permitted the jury to retire with tape-recordings and a transcript of statements made by the accused over the telephone.[134] The New Brunswick Court of Appeal, however, has held that a trial judge erred in permitting the jury to take with them the evidence of a witness taken under Commission.[135]

Written statements, although admitted into evidence, should normally not be given to the jury for the same reasons that a copy of the transcript of witnesses' testimony should normally not be provided to the jury. Indeed, if written statements are given to the jury but not copies of the transcript, there is a danger that the jury will re-read, examine, and give greater emphasis or closer scrutiny to such written statements than to the testimony of witnesses.

Written statements must be treated by the jury in the same way that they treat oral evidence adduced at trial, that is, they must assess its weight by evaluating the perception, memory, narration and sincerity of the statement's author. This is difficult enough since the jury cannot observe the author's demeanour or hear him or her cross-examined. Thus it is important that written statements be treated like other oral evidence as much as possible. If the jury wishes to review a written statement, it should be requested to return to court and have the statement re-read, just as it must do for any other testimony.

It would seem even more important that prior written confessions and admissions of the accused not be sent to the jury room. Confessions and admissions are often obtained under strained circumstances; thus, their credibility could be even more dubious than that of other written statements. If written statements are not allowed into the jury room because they might receive closer criticism or greater emphasis than other oral evidence, is it illogical to admit written confessions which would be subject to the same, if not greater, abuse? It is difficult enough for a jury to assess the credibility of a confession objectively without sending a copy of it into the jury room where it will, of necessity, assume a focal point in the jurors' minds and possibly overshadow other evidence adduced at trial which throws doubt on the confession's reliability.

However, the putative author of the confession is the accused, who may or may not have testified in the presence of the jury. This circumstance puts the purported confession in a different category from that of the statement of an absent author, in that the accused has the right to explain an admissible confession by oral testimony; even though there may be good reasons for declining to exercise that right. Although this question verges on the larger issue of self-incrimination, which is the subject of a concurrent study, we should nevertheless appreciate readers' opinions on this narrower question.

B. Jury Request to Review the Evidence

Recommendation 22

22.1. Conditions under which the judge should grant the jury's request to review the evidence:

the jury, after retiring to deliberate, may request a review of certain testimony or other evidence about which it is in doubt or disagreement. The judge shall grant such a request unless it relates to a matter not in evidence or the answer is prohibited by law.

22.2. Procedure when jury requests to review the evidence:

upon receiving a request to review the evidence, the judge must direct that the jury be returned to the courtroom, and, after notice to both the prosecution and counsel for the accused, and in the presence of the accused, must give such requested information.

22.3. Manner of reviewing the evidence:

the judge shall have the requested parts of the testimony read to the jury and shall permit the jury to examine the requested materials admitted into evidence.

22.4. Duty to review evidence beyond that requested by the jury:

as well as submitting to the jury for review the evidence specifically requested by the jury, the judge must also have the jury review other evidence relating to the same factual issue and the credibility of the relevant witnesses if it is necessary in order to avoid giving undue prominence to, or a misleading impression of, the evidence requested.

COMMENT

Introduction

If a trial has lasted a number of days, the jurors may find that they have difficulty recalling some of the testimony when they retire to deliberate. Even in short trials the jurors may be unable to agree, during their deliberations, on the content or tenor of certain testimony. When the jury is not able to recall what happened at trial or disagrees about certain evidence, it is common practice for them to ask to review the evidence in order to refresh their memories. The following recommendations are designed to ensure that this review of the evidence is conducted fairly and expeditiously.

22.1. Conditions under which the judge should grant the jury's request to review the evidence:

the jury, after retiring to deliberate, may request a review of certain testimony or other evidence about which they are in doubt or disagreement. The judge shall grant such a request unless it relates to a matter not in evidence or the answer is prohibited by law.

COMMENT

If the jury does not understand or cannot recall all of the evidence in the course of their deliberations, they will be unable to discharge their responsibility. Therefore, their request to review the evidence should always be granted.[136] However, sometimes the jury's request goes beyond a review of the evidence. In these instances its request should not be granted. For example, a request to see a letter that was mentioned during the trial but not introduced into evidence was properly denied.[137] It has also been held to be an error to accede to a jury's request to view the scene of the crime after it had retired for deliberations.[138] Clearly, if the jury's request would involve calling new evidence, it must be denied and the

jury instructed that its responsibility is to decide the case on the basis of the evidence put before it. Thus in *R. v. Owen*,[139] in which a witness was recalled in order to answer a question that the jury asked sometime after it retired to consider its verdict, the verdict was set aside. The English Court of Criminal Appeal stated: "We think they might have been told that the prosecution had laid before them such evidence as they thought fit and the evidence could not now be reopened."[140] This case was followed in *R. v. Brown*[141] in which, after the judge's summing-up, a new witness was called and questioned at the jury's request. The Quebec Court of Appeal, in holding that this constituted a serious error, stated that the trial judge should have told the jury that "it was their duty to decide the case on the evidence put before them and that if they had a reasonable doubt that the Crown had proved the guilt of the accused it was their duty to give him the benefit of the doubt and to acquit".[142]

Thus, the trial judge should decline to answer the jury's question whenever it would entail introducing new evidence or would violate a substantive or procedural rule of law. In other words, the jury is not entitled to exceed the bounds of the adversarial system. It is counsels' right to present their cases as they see fit, and the jury does not have the power to ask for additional information which it thinks would be relevant to the issues which it must decide. Although it could be argued that the jurors are the ones most capable of deciding what evidence is necessary to come to an intelligent decision on the facts, such a power would exceed even the judge's rights and powers and would distort our criminal justice system.

The situation where the jury requests new evidence is to be distinguished, however, from a request by counsel to introduce fresh evidence. Where such evidence could not have been discovered earlier with reasonable diligence, or where the interests of justice require, the judge seems to have discretion to allow new defence evidence.[143] This has been in civil cases allowed even where judgment has been given but the formal judgment not yet entered.[144] In any event the Crown is not permitted to split its case.

Established rules of substantive law and procedure should not be waived merely because a jury makes a request. Such a practice would make the law unpredictable and would result in different accused persons receiving different treatment. For example, the trial judge is not allowed to comment on the failure of the accused or his spouse to take the stand. This is a basic right enjoyed by the accused, and to waive it in those cases where the jury specifically asked the judge for his opinion on this subject would seriously prejudice the accused's right to a fair trial and to equal treatment by the law.

The recommendation does not recognize as a basis for refusing to comply with a request to review the evidence that it would take too much time to answer the jury's request.[145] It is conceivable that the jury might request that all of the testimony be re-read or that all of the testimony of a particular witness be re-read even though it bears only slightly on the real issues in the case. This might be not only time-consuming, but there is a danger that if large parts of testimony are re-read, the jury might lose interest or will forget portions of the testimony. Therefore, the judge should clearly be at liberty to ask the jury to reconsider their request in the light of the time it would take to comply with it, and to ask them to attempt to specify more precisely the matters which are causing them trouble.[146] Usually relevant portions of direct examination and cross-examination can be identified without reading all the testimony. However, if the jury persists in desiring to re-hear the testimony, their request should be granted. The importance of having the trial resolved on the evidence is too great to be jeopardized at this point in the trial.

22.2. Procedure when jury requests to review the evidence:

upon receiving a request to review the evidence, the judge must direct that the jury be returned to the court room, and, after notice to both the prosecution and counsel for the accused, and in the presence of the accused, must give such requested information.

COMMENT

Reviewing the evidence for the jury is one of the most important aspects of the trial. It involves a portion of the evidence which the jury cannot recall accurately, but which they feel is essential to an adequate understanding of the case. Thus, no review should take place unless the accused is present[147] and counsel in the case have been notified. It is one of the accused's basic rights to be present at his trial and this right is especially important when jurors have indicated that they do not understand or remember what has occurred and are forced to rely on review of the proceedings. Similarly, counsel should be present to ensure that both sides are adequately represented because a misstatement at this stage could seriously prejudice the outcome of the trial. It is also important that counsel be able to make proper objections so as to be able to appeal any rulings made by the judge which they consider improper or prejudicial.

22.3. Manner of reviewing the evidence:

the judge shall have the requested parts of the testimony read to the jury and shall permit the jury to examine the requested materials admitted into evidence.

COMMENT

Under the present practice the requested parts of the testimony are usually read to the jury. However, some judges, if it appears that it would consume an inordinate amount of time to find and read the requested part of the testimony to the jury, ask the jury if a summary of the evidence based on the trial judge's notes will suffice. This procedure has been outlined by Justice Haines:

> Perhaps one of the most vexatious problems is when the jury asks that certain evidence be read to them. Even with the best reporters this can be a difficult and time consuming task. . . . Usually I ask the jury to retire telling them I will confer with counsel. If the reporter cannot find and read the evidence quickly, I review my notes with

> counsel, agree on what was said, and recall the jury telling them that counsel agree the following note of the evidence is correct in substance. Then it is read to them. I am told this is the English practice, and it saves a great deal of time.[118]

Such a practice, however, even though surrounded by procedural protections, including agreement from both counsel, may still result in the jury's receiving an inaccurate review of what was said by the witnesses. At this stage in the jury's deliberations, the exact testimony given by the witness might be important to the jury. New and improved methods of transcribing testimony should seldom result in any difficulty in tracing the necessary testimony, even in long trials. However we seek readers' opinions about whether the jury should have the right to hear the relevant testimony read to them *verbatim*, even though to do so might take hours or days, or whether it would be sufficient with counsel's consent at least, to read the judge's notes of the testimony.

22.4. Duty to review evidence beyond that requested by the jury:

as well as submitting to the jury for review the evidence specifically requested by the jury, the judge must also have the jury review other evidence relating to the same factual issue and the credibility of the relevant witnesses if it is necessary in order to avoid giving undue prominence to, or a misleading impression of, the evidence requested.

COMMENT

Under the present law if the jury requests that the direct examination of a witness be reviewed, the judge must also read to the jury any portion of the cross-examination of that witness which in any way might affect the jury's evaluation of the direct examination. This must be done even though the jury insists that it is not necessary.[119] To do otherwise would tend "to nullify at that important time the effect of the actual cross-examination during the trial. The result could be as if the learned trial judge had stopped the cross-examination at

trial".[150] If the jury requests that a portion of a witness' testimony relating to a particular matter be reviewed, the judge does not have to re-read all of the testimony given by that witness. The judge must read back only the portion requested by the jury plus any other evidence or cross-examination which had altered or modified the effect of the requested evidence.[151] The recommendation is an effort to restate the present law as clearly as possible.

C. Secrecy of Jury Deliberations

Recommendation 23

Every member of a jury who discloses any information relating to the proceedings of the jury when it was absent from the court room which was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction, unless the information was disclosed for the purpose of:

(*a*) an investigation of an alleged offence under subsection 127(2) (obstructing justice) of the *Criminal Code* in relation to a juror, or giving evidence in criminal proceedings in relation to such an offence, or

(*b*) assisting the furtherance of scientific research about juries which is approved by the Chief Justice of the Province, or

(*c*) inquiring into the validity of a verdict as provided for in Chapter IX, Part D (Impeachment of the Verdict).

COMMENT

If jurors are to be encouraged to deliberate in total frankness then they must be provided with some assurance that what is said by them in the jury room will not be disclosed.

Most judges expressly instruct the jury that they are not to discuss the nature of their deliberations with anyone. At common law if a juror breached the confidence of the jury room deliberations, he or she might be held in contempt of court.[152]

In 1972, however, a section was added to the *Criminal Code* creating an offence for the disclosure of jury proceedings.[153] The recommendation substantially follows that section of the *Criminal Code*, but two additional exceptions are recommended.

Paragraph (*b*) of the recommendation would create an exception to the general rule that information relating to jury deliberations ought not to be disclosed to cover the situation where such information was disclosed for the purpose of scientific research about juries. Speaking to jurors about their deliberations after they have served on a jury could be an effective way of promoting understanding of the process of jury deliberations. Indeed it might be the only way. The findings of such a study could be important in revising the law or practice relating to jury trials, or in determining how well the jury is performing its functions. This type of research relating to one of our most important judicial institutions should not be completely foreclosed. Requiring approval of the Chief Justice of the Province should prevent any frivolous attempts at jury research and ensure that the exception is not abused. Indeed it is contemplated that the exception would be very seldom invoked.

The other additional exception for the disclosure of information relating to jury deliberations involves the case where the validity of the jury verdict is being inquired into as provided in Chapter IX, Part D. This exception is discussed in detail following that recommendation.

IX

Jury Verdicts

A. Motion for a Directed Verdict

Recommendation 24

24.1. At the conclusion of the prosecution's case, if the judge rules, either on the motion of a defendant or on the court's own motion, that there is no evidence to sustain a conviction of one or more offences charged, the judge shall order the entry of a judgment of acquittal. Such a motion by the defendant, if dismissed, shall not bar the defendant from offering evidence.

24.2. The court shall not reserve decision on the motion.

COMMENT

This recommendation clarifies and rationalizes to some extent the present practice relating to a motion for a directed verdict. The first recommendation clarifies the law in a number of respects. First, if there be no evidence to sustain a conviction it provides that the judge may take the case from the jury either on a motion by the defendant or on the judge's own initiative.

Second, it is recommended that if a motion for a directed verdict is granted that the judge simply order a judgment of acquittal. Under the present practice he must direct the jury to return a verdict of acquittal. This would appear to be a needless formality.

Third, the recommendation makes it clear that if the accused makes a motion for a directed verdict he is not barred from offering evidence in defence if the motion is not granted.

The second recommendation clarifies an important point of procedure relating to motions for a directed verdict. First, the accused is entitled to have a ruling on the motion before he decides whether to present evidence. If the judge could reserve on the motion until the accused had presented evidence, the motion would be of little value to the accused.

In the Commission's deliberations on this matter we discussed another consideration upon which we invite readers' opinions. If a motion for acquittal were made at the close of all evidence including that of and for the accused, should the judge be permitted to reserve decision on the motion, submit the case to the jury and decide the issue either before the jury returns a verdict, or after the jury returns a verdict of guilty, or is discharged without having returned a verdict? Although this would seem to be a most unsatisfactory manner of treating a jury, yet if the judge simply took the case from the jury at this point and were then reversed by the Court of Appeal, a new trial would have to be ordered even though the jury might have acquitted on the evidence.

We are not in favour of according to the trial judge the power to override the verdict of the jury. Perhaps it would, however, be worth considering empowering the judge to pronounce a judgment of acquittal in a proper case, only if the jury were unable to reach any verdict. In such cases a new trial would be avoided, a result which could be considered to be a reform, even if only of rare occurrence. We invite response.

B. Polling the Jury

Recommendation 25

When a verdict has been returned and before the jury has dispersed, the jury shall be polled at the request of any party or upon the court's own motion. The poll shall be conducted either by the judge or clerk of court asking each juror individually whether the verdict announced is his verdict, or, in the judge's discretion, by asking at large that any juror who does not concur with the announced verdict must indicate his or her non-concurrence by standing or speaking. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

COMMENT

As explained in Chapter III, the fact that the jury must be unanimous before they can return a verdict is one of the criminal justice system's most essential safeguards against convicting innocent persons. Normally, if the jury returns to the courtroom after deliberating and the foreman announces its verdict and no member of the jury protests the verdict, that is taken as sufficient evidence that the jury reached the verdict unanimously. However, if there is some doubt as to whether or not the verdict reflects the unanimous view of the jurors, the question arises as to how this fact ought to be determined.

One method of ensuring that each juror agrees with the verdict is to have the jury polled. Every juror is asked separately or at large by the judge or the clerk of the court whether he or she agrees with the verdict announced by the foreman. This is the method of ensuring that the jury unanimously supports the verdict announced.

While there is no requirement at common law that the jury must be polled upon the timely request of any party,[154] such a requirement would appear to make sense. Obviously, the parties should not be left in any doubt as to whether or

not the jury was unanimous. Polling the jury would appear to be the most effective procedure of removing any doubt. It is a procedure that is quick, convenient and accurate, and there would appear to be no reason for denying it, if it is requested by a party.

C. Judicial Comment on the Verdict

Recommendation 26

While it is appropriate for the court to thank jurors at the conclusion of the trial for their public service, such comments should not include praise or criticism of their verdict.

COMMENT

Jurors perform a valuable public service and undoubtedly appreciate having it acknowledged by the judge. However, from time to time, judges inform the jury of their opinion of their verdict, either by praising their verdict or by criticizing it. Not only should the judge not comment on the jury's verdict, but he should refrain from revealing his feelings about it. The jury should not reach their verdict to please or displease the judge and no pressure should be placed on them to do so. Some jurors might be sitting on subsequent cases and they should not have to do so fearing the wrath or seeking the praise of the judge. As well, a comment on the jury's verdict might influence the jury members' perception of the criminal justice system. Moreoever, it is unfair to a person who has been acquitted by a jury to be stigmatized by comments by the judge. It is no more appropriate for the judge to comment favourably or adversely about the jury's verdict, than it would be for counsel or the accused either to thank or to rebuke the judge for the judge's verdict in a non-jury trial.

D. Impeachment of the Verdict

Recommendation 27

27.1. The validity of a verdict may not be inquired into except upon an application to the Minister of Justice.

27.2. The Minister of Justice may, upon an application by or on behalf of a person who has been convicted by a jury, order a new trial, if after inquiry he is satisfied that some irregularity or misconduct occurred during the jury deliberations which indicates that the verdict did not reflect the judgment of all jurors.

27.3. Upon an inquiry into the validity of a verdict, a juror may not give evidence concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or to dissent from the verdict or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

COMMENT

In some cases the jury may reach its verdict in a manner that is clearly improper. They may reach their verdict by misapplying the law, agreeing that a majority vote will prevail, or in a close case by flipping a coin. If the jury reaches its verdict in a manner other than by a unanimous verdict following a rational weighing of the evidence, the question arises as to whether that verdict can be set aside. At common law the answer to this question has been clear since 1785. In that year, in *Vaise v. Delaval*,[155] Lord Mansfield held that the court could not consider affidavits sworn by jurors showing that they had agreed on a verdict by lot. This rule, that jurors cannot give evidence as to any misconduct which might have occurred in the jury room, now has legislative sanction in Canada. Section 576.2 of the *Criminal Code* provides generally that jurors cannot disclose any information relating to the proceedings of the jury when it is absent from the courtroom. The Saskatchewan Court of Appeal has held that this section has the effect of denying even a third party (a Sheriff who

overheard the jurors agree to be bound by a majority vote) the right to give evidence impeaching a jury's verdict.[156]

The rule that the jury's verdict is final and cannot be impeached by evidence that it was arrived at improperly reflects at least two important interests. First, it ensures the finality of the jury's verdict. To permit parties to dispute the jury's verdict on the grounds that alleged errors occurred within the jury's deliberative process or on the grounds that its verdict was arrived at improperly would unquestionably endanger the important principle of finality and unsettle the administration of justice. Second, the rule protects jurors from harassment after they have delivered their verdict. Jurors, having given their verdict, should be able to resume their day-to- day activities free from the anxiety and other concerns that would be caused if they were pursued by persistent investigators out to discover some error in the manner in which they reached their verdict.

However, the absolute finality of jury verdicts is achieved at an enormous cost. From time to time cases do arise in which the accused has been convicted by a jury which reached the verdict of guilty by some improper means, for example, flipping a coin or a majority vote. In these cases some recourse should be provided the accused. The recommendation attempts to strike a balance between these conflicting interests by providing that while jurors cannot give evidence about their subjective mental processes in reaching a verdict, they can give testimony about objective events from which it can be inferred that they reached their verdict improperly. Thus, a juror could not give evidence that he or she voted for conviction because the accused was a member of a particular race. Such an inquiry could lead to endless and unresolvable disputes. However, evidence could be given that the jury reached their verdict by flipping a coin. This distinction between subjective and objective events is in accord with that adopted in dealing with this problem in most modern American rules of evidence.[157] The instances where the jury engages in such activity will be few so that the interests in the finality of jury verdicts is not seriously impaired by this compromise. But yet a remedy is provided to the accused in cases of blatant jury misconduct.

Epilogue

The purpose of this Working Paper, in common with all of our others, is to engage the Canadian public, including all persons with special knowledge of or interest in the subject, to respond to the Commission's tentative recommendations. All responses will be carefully considered in formulating our Report to Parliament on the Jury.

Endnotes

1. H. Kalven and H. Zeisel, *The American Jury* 4 (1966).

2. The classic contemporary criticisms is J. Frank, *Courts on Trial* (1949). Compare the favourable view of P. Devlin, *Trial by Jury* (1956) with G. Williams, *The Proof of Guilt*, (3rd ed. 1963).

3. W. Blackstone, 3 *Commentaries on the Law of England* 379 (8th ed. 1778).

4. Quoted in 7 J. C. Campbell, *Lives of the Lord Chancellors* 35 (3rd ed. 1874).

5. Mark Twain, quoted in 10 Trial 10 (Nov. 1974).

6. H. Mannheim, *Criminal Justice and Social Reconstruction* 246 (1946).

7. *Public's View of the Criminal Jury Trial*, in collected Background Studies on the Jury, Study Paper, L.R.C. of Canada, 1979.

8. *Canadian Trial Judges' View of the Criminal Jury Trial*, in collected Background Studies on the Jury, Study Paper, L.R.C. of Canada, 1979.

9. *Canadian Juror's View of the Criminal Jury Trial*, in collected Background Studies on the Jury, Study Paper, L.R.C. of Canada, 1979.

10. Aspects of the Law 10 (1948).

11. 38 Law Journal 469 (1903).

12. Quoted in Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L.J. 170, 172, n. 8 (1964). J. Frank, *Courts on Trial* 119-120 (1949).

13. H. Kalven and H. Zeisel, *The American Jury*, (1966).

14. *Ibid.* at 157.

15. R. Simon, *The Jury and the Defense of Insanity* (1967).

16. *Ibid.* at 175.

17. H. Kalven and H. Zeisel, *The American Jury* 286, 492, 499 (1966).

18. Kalven, *The Dignity of the Civil Jury*, 50 Virginia L. Rev. 1055, 1071 (1964).

19. See Brooks and Doob, *Justice and the Jury*, 31 J. of Social Issues 171 (1975).

20. P. Devlin, *Trial by Jury* 163-64 (1956).

21. G. Williams, supra note 2 at 26.

22. See Scheflin, *Jury Nullification: The Right to Say No*, 45 California L. Rev. 168 (1972).

23. G. Howell's St. Tr. 999; 124 Eng. Rep. 1006 (C.C.P., 1670).

24. However, in some instances a Court of Appeal can override a jury's verdict, by quashing the verdict and (a) substituting the acquittal of the accused in place of the jury's verdict of guilty; or (b) directing a new trial.

25. Lord John Russell, *Essay on the English Government and Constitution* (1823), quoted in Linn, *Charges in Trial by Jury*, 3 Temple L.Q. 3, 5 (1928).

26. J. Stephen, *A History of the Criminal Law of England*, 572-73.

27. Kalven and Zeisel, *The American Jury* 7 (1966).

28. *Follow-Up/The Jury*, The Center Magazine 60 (Vol. III, No. 4, July, 1970).

29. *Anonymous Case*, 41 Lib. Assisarum 11 (1367), reprinted in English in R. Pound and T. Plucknett, *Readings on the History and System of the Common Law* 155-56, (3rd ed. 1927).

30. See Ryan, *Less Than Unanimous Jury Verdicts in Criminal Trials*, 58 J. Crim. L., Crim. & P.S., 211, 212 (1967); Downie, *"And Is That The Verdict of You All?"*, 44 Aust. L.J. 482, 483-484 (1970). For a summary of the explanations that have been given for the development of the unanimity requirement see *Apodaca v. Oregon*, 406 U.S. 404, 407, n.2 (1972) (*per* White J.).

31. *Criminal Justice Act, 1967*, c. 80, s. 13 (U.K.).

32. *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). In *Johnson v. Louisiana* the Court dealt only with the arguments based on the Fourteenth Amendment due process clause, since that case was decided at trial prior to *Duncan v. Louisiana*, 391 U.S. 145 (1968), which was the first case to hold that the Sixth Amendment jury trial guarantee was binding on the state through the Fourteenth Amendment. In *Apodaca v. Oregon*, the Court dealt

directly with the question of whether the unanimity requirement was an essential characteristic of jury trial.

33. Oregon (since 1934), *Ore. Const.* art. I, s. 11 (10:2 except for a verdict of guilty of first degree murder); Louisiana (since 1898 its constitution has provided for majority verdicts in some form), *La. Const.* art. I, s. 17 (unanimous verdict of 12 in capital cases; 10:2 if hard labour must be imposed; 5:1 if hard labour or confinement without hard labour for over six months may be imposed); Idaho (since 1890) *Idaho Const.* art. I, s. 7 (10:2 for offences below the grade of felony); Montana (since 1889) *Mont. Const.* art. III, s. 23 (8:4 for offences below the grade of felony, except in a justice's court where 4:2 decisions for offences below the grade of felony are valid); Oklahoma (since 1907), *Okla. Const.* art. II, s. 19 (9:3 for offences below the grade of felony in a court of record and 5:1 in offences below the grade of felony tried in a county court or court not of record); Texas (since 1876) *Tex. Const.* art. V, s. 13 (9:3 for offences below the grade of felony);

34. Northern Territory of Australia (since 1962) *Juries Ordinance 1962* (No. 30 of 1963) s. 48 (2), (3) (9:3 verdict in criminal cases, except capital cases, is acceptable after twelve hours of deliberations); Western Australia (since 1957) *Juries Act* (No. 50 of 1957) s. 41, (10:2 in offences not punishable by death after the three hours of deliberation); South Australia (since 1927) *Juries Act, 1927* (No. 1805 of 1927), s. 57, (10:2 verdict is acceptable after four hours of deliberation in all but capital cases); Tasmania (since 1936) *Jury Act 1899* (63 Vict. No. 32) as amended by *Jury Act 1936* (1 Edw. 8 No. 2) s. 48(2) (10:2 for offence other than a crime punishable by death after two hours of deliberation, and as amended by *Jury Act 1943* (7 Geo. VI No. 29) s. 48(3) (10:2 for offence punishable by death where verdict of not guilty or guilty of manslaughter after six hours of deliberation).

35. Scotland (since the 16th century) *Administration of Justice (Scotland) Act, 1933*, 23 & 24 Geo. 5, c. 41 s. 11 (8:7 in any case, with no requirements as to length of deliberations).

36. Trinidad and Tobago (since 1922) *Jury Ordinance*, Ch. 4, No. 2-1950, s. 24(1) (unanimous verdict of 12 to convict of murder or treason, but the court may accept 9:3 verdict of manslaughter after three hours; in all other cases, the court may accept 7:2 verdict after three hours).

37. Parl. Debs. — Lords, 5th Series, vol. 283, cols. 325 *et seq.*; Parl. Debs. — Commons, 5th Series, vol. 738, col. 203, col. 1744; Samuels, *Criminal Justice Act*, 31 Mod. L. Rev. 16, 24-27 (1968); R. M. Jackson, *The Machinery of Justice in England*, 399 (6th ed. 1972).

38. Quoted in Downie, "*And Is That The Verdict of You All?*", 44 Aust. L.J. 482 (1970).

39. Statistics Canada, *Statistics of Criminal and Other Offences* (for the years 1970, 1971 and 1972).

STATISTICS ON HUNG JURIES

(excluding Quebec and Alberta)

	1970	1971	1972
Number of Persons Charged with Indictable Offences	51,866	54,098	55,541
Number of Persons Whose Case Resulted in Hung Jury	14	8	5
Percentage of Persons Charged Whose Case Resulted in a Hung Jury	.027%	.015%	.009%
Number of Persons Tried By Judge and Jury	1,171	1,126	1,279
Percentage of Persons Tried By Judge and Jury Whose Case Resulted in a Hung Jury	1.196%	.710%	.391%
Total Number of Charges for Indictable Offences	86,597	92,335	95,132
Number of Charges which Resulted in Hung Juries	24	29	30
Percentage of Charges for Indictable Offences which Resulted in Hung Juries	.028%	.031%	.032%

40. H. Kalven and H. Zeisel, *The American Jury*, 461 (1966).

41. Parl. Debs. — Commons, 5th Series, vol. 738, col. 56 (Dec. 12, 1966).

42. *Supra* note 40, at 461.

43. *Morris Report*, Cmnd. 2627 (1965).

44. *Ibid.* at 113.

45. *Huffman v. U.S.*, 297 F.2d 754 (5th Cir. 1962).

46. Samuels, *Criminal Justice Act*, 31 Mod. L. Rev. 16, 25 (1968); W.R. Cornish, *The Jury*, 158-162 (1968).

47. See Statistics Canada, *Statistics on Criminal and Other Offences* (for the years 1970, 1971, and 1972).

48. Kalven and Zeisel, *The American Jury: Notes for an English Controversy*, 48 Chi. B. Rec. Record 195, 200 (1967).

49. *Ibid.*

50. *Supra* note 40 at 463.

51. *Supra* note 48 at 201.

52. J. Stephen, *A History of Criminal Law in England,* 304 (1883),

53. P. Devlin, *Trial by Jury* 57 (1966).

54. David *et al., The Decision Process as of 6 and 12 – Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. Personality & Soc. Psych. 1 (1973).

55. Nemeth, "Rules Governing Jury Deliberations: A Consideration of Recent Changes", in G. Bermant *et al.*, (eds.), *Psychology and the Law: Research Frontiers* (1976).

56. The present requirement for twelve members is imposed by the *Criminal Code*, R.S.C., 1970, c. C-34, s. 560(5). In the Yukon Territory and the Northwest Territories, juries are composed of only six jurors, (s. 561). This smaller jury is apparently ordained in the territories because of the sparseness of the population. (See Parliament Debates — H. of C., Vol. IV, 1967, p. 3819, where T. J. Nugent, an M.P. from Alberta, explained that the six person jury in Alberta "was initiated at a time when the West was sparsely settled".)

57. S.C. 1968-69, c. 38, s. 50. (now s. 572(1) c.c.)

58. Parliament Debates — H. of C., Vol. IV, 1967, p. 3819. (*per* Nugent, M.P.).

59. 29 C.C.C. (2d) 279 at 293 (1975). See also *R. v. Makow*, (1974) 20 C.C.C. (2d) 513; 28 C.R.N.S. 87 (B.C. C.A.).

60. *Ibid.*

61. 45.1 (1) Every employer shall allow an employee leave of absence from his employment when the employee is summoned to serve as a juror sufficient for him to serve as he may be required.

(2) Every employer or agent of an employer who, directly or indirectly,

(*a*) threatens to cause or causes actual loss of position or employment of, or

(*b*) threatens to impose or imposes any pecuniary or other penalty on,

an employee summoned because of his response to the summons or his service as a juror is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding $1,000. or an imprisonment for not more than three months, or to both fine and imprisonment.

[*An Act to Amend the Jury Act,* S.A. 1971, c. 56.]

See also *Jury Act*, S.Q. 1976, c. 9, as amended by S.Q. 1977, c. 17, s. 46a.

62. S.N. 1974, No. 58.

63. *Judicature Act*, S.N., No. 58, s.2.

64. *Jury Duty*. Produced by the Law Reform Commission of Canada in conjunction with the National Film Board of Canada.

65. R. McBride, *The Art of Instructing the Jury*, 359 (1969).

66. For a compilation and survey of the use of pattern jury instructions in the various American States see J. Alfini, *Pattern Jury Instructions*, Appendix III (1972); see also Sales, *et al.*, "Improving Comprehension for Jury Instructions," in B.D. Sales *et al.*, 1 *Perspectives in Law and Psychology*, 23, 24-26 (1977).

    The most comprehensive and widely used books of pattern jury instructions are E. Devitt *et al.*, *Federal Jury Practice and Instructions* (1970); *California Jury Instructions — Civil and Criminal* (1969, 1970); *Illinois Pattern Jury Instructions — Civil and Criminal* (1961, 1968); *New York Pattern Jury Instructions* (1965); *Missouri Approved Jury Instructions* (1969).

67. S. Henderson, *Pattern Jury Instructions in Theory and Practice* 12 (1969).

68. Quoted in Schroeder, "The Charge to the Jury", in *Special Lectures of the Law Society of Upper Canada*, 341 (1959).

69. Lessley, *Montana Jury Instruction Guides*, 27 Mont. L. Rev. 125, 127 (1966).

70. O'Mara, *Standard Jury Charges — Findings of Pilot Project*, Penn. B. A. Q. 166 (1972); Sigworth *et al.*, *Jurors Comprehension of Jury Instructions in Southern Arizona*. (Unpublished report prepared for the Committee on Uniform Jury Instruction of Supreme Court of the State of Arizona, 1973; Sales, *et al.*, "Improving Comprehension for Jury Instruction", in B. Sales, ed., *Perspectives in Law and Psychology*, vol. 1 (The Criminal Justice System)(1977)).

71. See Segworth, *Arizona Uniform Jury Instruction*, 8 Ariz. B.J. 9 (1973); Meyer and Rosenberg, *Questions Juries Ask: Untapped Springs of Insight*, 55 Judicature 105 (1971).

72. Meyer and Rosenberg, *supra* note 71.

73. See Haines, *Criminal and Civil Charges*, 46 Can. B. Rev. 48 (1968).

74. *Ibid.*

75. There is no rule of law nor, in my opinion, of practice that failure of counsel, either for an accused or for the Crown ... to object to a

charge to the jury on the ground of misdirection, is of necessity, a bar to the right of appeal.

[*Cullen v. The King*, [1949] S.C.R., 658, 664, [1949] 3.D.L.R. 241, 247 *per* Locke, J.]

It is true that no objection was made to the charge in this respect, and the trial judge was not asked to charge the jury in the manner that is now contended for. That omission cannot, however, be permitted, in the case of a capital charge, to deprive the appellant of his right now to complain of the charge.
R. v. MacDonald [1939] O.R. 606, 615, *per* Robertson C.J.O.

76. Most cases do not give an explanation of why counsel's failure to object is relevant in determining whether there was a "substantial wrong or miscarriage of justice" which justifies a new trial under section 613(*a*)(*b*)(ii) of the *Criminal Code*; however, the reason appears to be that it is felt to be some evidence that, at the time and in the atmosphere of the trial, counsel was convinced of the charge's adequacy, propriety, and clarity.

> Responsibility for the consequences of any error in the proceedings at trial that might occasion prejudice against the accused rests firstly and finally with counsel for the accused. It is his duty to discover any such error whether of commission or omission at the time it occurs and to then direct the attention of the presiding judge to it by making appropriate objection. The failure to make such an objection does not necessarily preclude counsel from making the error a ground of appeal against the conviction and is not always an answer to an application to the Court of Appeal for an order directing that there be a new trial. Nevertheless, the absence of an objection by counsel may be taken into consideration by this Court in considering the propriety of the proceedings and the question of whether or not there has been any substantial wrong or miscarriage of justice. Thus in *R. v. Melyniuk* 24 Alta. L. R. 545, [1930] 2 W.W.R. 179, 53 C.C.C. 296, [1930] 4 D.L.R. 462, 13 Can. Abr. 1350, it was stated following *R. v. Hill*, (1928), 61 O.L.R. 645, 49 C.C.C. 161, [1928] 2 D.L.R. 736, 13 Can. Abr. 1350, that: "A fair test of the propriety of a charge [to a jury] is that no objection was taken to it at the time it was delivered — not its subjection afterwards to microscopic scrutiny before an Appellate Court."

R. v. Lukas (1962), 33 C.R. 403, 407 (Ont. C.A.) *per* Laidlaw J.A. See also *R. v. Armstrong* (1933), 59 C.C.C. 172, 177 (Ont. C.A) per Middleton J.A.

77. *See Hughes v. Dinorben* (1859), 32 L.T. (o.s.) at 272.

78. It has been said more than once that a judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself. If that be the Judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter.

[*Stirland v. D.P.P.* [*1944*] A.C. 315, 327 [1944] 2 All E.R. 13, 18. See also Rand J. (dissenting), *Cullen v. The King*, *supra* note 75, at 655 (S.C.R.), 248 (D.L.R.).]

79. *Ibid.* at 668 (S.C.R.), 250 (D.L.R.).

80. Ibid.

81. For example, the Fifth Amendment of the United States Constitution provides that no person "be subject for the same offence to be twice put in jeopardy of life or limb". The United States Supreme Court decided in *Benton v. Maryland*, 395 U.S. 784 (1968), that this prohibition is enforceable against the states through the Fourteenth Amendment. See also *Green v. United States*, 355 U.S. 184 (1957) at 187-88:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

82. California Law Revision Commission, *Recommendation and Study Relating to Taking Instructions to the Jury Room* 10-11 (1956).

83. Cunningham, *Should Instructions go into the Jury Room?* 33 Cal. S.B.J. 278 (1958).

84. Forston, *Sense and Nonsense: Jury Trial Communications* [1975] Brigham Young U.L. Rev. 601.

85. For a summary of the arguments for and against, see Cunningham, *supra* note 83.

86. C. Joiner, *Civil Justice and the Jury* 84, (1962); Meyer and Rosenberg, *Questions Juries Ask: Untapped Springs of Insight*, 55 Judicature 105, 107, (1971); Katz, *Reinstructing the Jury by Tape Recordings*, 41 S. Am. Jud. Soc'y 178 (1958).

87. See Tabular Summary of Law of Other States, California Law Revision Commission, *Recommendation and Study Relating to Taking Instructions to the Jury Room*, C-15 to C-17 (1956).

88. Meyer and Rosenberg, *Questions Juries Ask: Untapped Springs of Insight*, 55 Judicature 105, 107 (1971); Smith, *Orthodoxy v. Reformation in the Jury System*, 51 Judicature 344 (1968); Davitt, *Ten Practical Suggestions about Federal Jury Instructions*, 38 Fed. Rules Dec. 75 (1966).

89. Forston, *Justice, Jurors and Judges Instructions*, 12 Judges J. 69 (1973).

90. Forston, *Sense and Non-sense: Jury Trial Communication, supra* note 84.

91. Sigworth and Herze, *Jurors' Comprehension of Jury Instructions in Southern Arizona* (unpublished report, 1973), cited in Forston, *supra* note 84 at 620, n. 29.

92. Maloney, *Should Jurors Have Written Instructions?* 6 Trial Judges J. 18 (1967); O'Reilly, *Why Some Juries Fail*, 41 J.B.A.D.C. 60, 74 (1974).

93. (1952) 104 C.C.C. 97, 98, [1952] 2 S.C.R. 495, 497-98.

94. [1965] S.C.R. 739, 752, 52 D.L.R. (2d) 416, 426.

95. *R. v. Dwyer* (1977), 35 C.C.C. (2d) 400.

96. *Ibid.*, at 406.

97. *R. v. Smithers* (1975), 24 C.C.C. (2d) 344, 346 (1976), 9 O.R. 2d 127, 130 (Ont. C.A. per Evans J.A.). For a similar statement see the case on appeal to the Supreme Court, *Smithers v. The Queen*, (1977), 40 C.R.N.S. 79, [1978] S.C.R. 506.

98. *R. v. Hughes* (1942), 78 C.C.C. 1, 15.

99. *R. v. Wydryk and Wilkie* [1972] 2 W.W.R. 81 (B.C. C.A.).

100. *Ambrose v. The Queen*, (1976), 30 C.C.C. (2d) 97, 104 (1977) 69 D.L.R. (3d) 673, 679, [1977] 2 S.C.R. 717, 724.

101. See *Regina v. Cavanagh* (1976), 33 C.C.C. (2d) 134 at 146 (Ont. C.A.) where it was stated that it was misleading to refer to the "theory of the Crown" and the "theory of the defence".

102. For recent cases see *R. v. Cavanagh*, (1976), 33 C.C.C. (2d) 134, 142.

103. See for example *R. v. Ritchie* (1976), 31 C.C.C. (2d) 208, 212 (Ont. C.A.)

> It is difficult to define the limits on a trial judge's right to comment on the evidence and the issues. The line must be the line of fairness and, with the very greatest respect for the very able trial judge, we think that a forceful statement by a trial judge of his opinion that the accused is guilty, goes too far.

104. See *supra* note 102 at 143.

105. Annot., 15 A.L.R. (2d) 490 (1951).

106. The following instruction is taken from an American source, *Jury Instructions and Forms for Federal Criminal Cases*, para. 18.11, 27 Fed. Rules Dec. 39, 97-98 (1961):

> The verdict must represent the considered judgment of each juror.

In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans, you are judges — judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

107. *R. v. Dorazio* [1947] O.W.N. 721; *R. v. Cunningham* (1951), 12 C.R. 422 (N.B.C.A.). But *see R. v. Davey* [1960] 3 All E.R. 533 in which the court said the jury would understand they had to support their verdict unanimously without being expressly so told.

108. *Latour v. The King* [1951] S.C.R. 19, 30 [1951] 1 D.L.R. 834, 835.

109. *Hébert v. The King*, [1955] S.C.R. 120, 20 C.R. 79.

See the judgments of Kerwin C.J.C. at 122 S.C.R., 81 C.R.'s Rand J. at 128 S.C.R., 86 C.R., and Estey J. at 131 S.C.R., 89-90 C.R.

110. *Harrison v. The Queen* (1974), 27 C.R.N.S. 294 [1975] 2 S.C.R. 95, 48 D.L.R. (3d) 536.

111. *R. v. King, et al.* (1974), 27 C.R.N.S. 303 (1974) (Ont. C.A.); *R. v. King Jr.* (1974), 27 C.R.N.S. 310.

112. *R. v. Palmer*, (1969), 9 C.R.N.S. 342, 351-52, (1970) 71 W.W.R. 344, 353-54 (B.C.C.A.). *R. v. Siniarski* (1969), 67 W.W.R. 217 (Sask. C.A.)

113. [1961] 3 All E.R. 966.

114. Brown, *Note Taking by Jurors*, 10 Judges J. 27 (1971).

115. Forston, Sense and Non-Sense: Jury Trial Communication, [1975] Brigham Young U.L. Rev. 601, 628.

116. Edises, One-Way Communication: Achille's Heel of the Jury System, 13 Judges 78 (1974) [1929]

117. *Hobbs v. Tinling* [1929] 2 K.B. 1, [1929] All E.R. Rep. 33 " ... any communication from the jury to the judge should be communicated to the parties" *per* Scrutton L.J., at 24 K.B., 43 All E.R.

118. *R. v. Watson* [1936] 2 W.W.R. 560, [1936] 4 D.L.R. 358, 50 B.C.R. 531, 66 C.C.C. 233 (B.C.C.A.).

119. *R. v. Batterman* (1915), 8 O.W.N. 554, 24 C.C.C. 351 (Ont. S.C.).

120. *R. v. Matt* (1967), 60 W.W.R. 571, 573 (Alta. S.C.); *R. v. Stanford* (1975), 27 C.C.C. (2d) 520, 525-526, [1975] C.A. 532 (Que. C.A.); *Jackson v. C.P.R.*, [1947] 2 W.W.R. 337 (Alta. Dist. Ct.); *R. v. Vawryk & Appleyard*, [1979] 3 W.W.R. 50 (Man. C.A.).

121. See *Cathro v. The Queen*, (1955), 2 D.L.R. (2d) 270, 284, [1956] S.C.R. 101, 115; *R. v. Matt* (1967), 60 W.W. R. 571, 573 (Alta. S.C.); *R. v. Schimanowsky*, [1974] 1 W.W.R., 738 (Sask. C.A.); *R. v. Stanford* (1975), 27 C.C.C. (2d) 520, 525-26, [1975] C.A. 532 (Que. C.A.); *R. v. Vawryk & Appleyard*, [1979] 3 W.W.R. 50 (Man. C.A.).

122. *R. v. Tennant* (1975), 31 C.R.N.S. 1, (1975) 7 O.R (2d) 687.

123. *Ibid.* at 25 (C.R.N.S.), 710 (O.R.).

124. *Ibid.* at 26 (C.R.N.S.), 710 (O.R.).

125. *R. v. Vawryk & Appleyard* [1979] 3 W.W.R. 50 (Man. C.A.).

126. *R. v. Parkin (1) and (2)*, [1922] 1 W.W.R. 732, 66 D.L.R. 175, 31 Man. R. 438, 37 C.C.C. 35 (Man. C.A.).

127. *Ibid.* per Perdue C.J.M. at 759-60, 769-70.

128. *Manchuk v. The King* [1938] S.C.R. 341, [1938] 3 D.L.R. 693.

129. *Ibid.*, at 348 S.C.R., at 698 D.L.R.

130. See *J. Wigmore, 6 Evidence* para. 1802 (1942).

131. See *R. v. McCrea* (1969), 70 W.W.R. 663.

132. *Ibid.* at 668.

133. See *R. v. Imperial Tobacco Co. of Canada*, (1942) 1 W.W.R. 363, 77 C.C.C. 146; *Cathro v. The Queen* (1956) S.C.R. 101, 22 C.R. 231, 113 C.C.C. 225; *R. v. McCrae* (1969), 70 W.W.R. 663; *R. v. Black* (1970), 72 W.W.R. 497, 10 C.R. NS. 17, 4 C.C.C. 251.

Huard v. The King (1949), 8 C.R. 337, 343; [1949] Que. Q.B. 568.

134. *R. v. Black*, *supra* note 133.

135. *Royal Bank of Canada v. Hale* [1905], 37 N.B.R. 47.

136. See *R. v. Smith*, [1975], 5 W.W.R. 456, 466 (B.C.C.A.).

137. *R. v. Batterman* (1915), 34 O.L.R. 225, 24 C.C.C. 351 (Ont. S.C.).

138. *R. v. March* [1940], 3 W.W.R. 621 (B.C.C.A.).

139. *R. v. Owen* (1952), 36 Cr. App. R. 16.

140. *Ibid.* at 22.

141. [1967] 3 C.C.C. 210; [1966] Que. Q.B. 502 (Que. C.A.).

142. *Ibid.* at 218 (C.C.C.)

143. *Clayton v. B. A. Securities* [1934] 3 W.W.R. 257, [1935] D.L.R. 432; *R. v. Stanford* (1975), 27 C.C.C. (2d) [1975] C.A. 532 520 (Que. C.A.).

144. *Sales v. Calgary Stock Exchange* [1931] 3 W.W.R. 392 (Alta S.C.); *Clayton v. B.A. Securities*, *supra* note 8; *Becker Milk Co. v. Consumers' Gas Co.* (1974), 43 D.L.R. (3d) 498 (Ont. C.A).

145. See *R. v. Mace* (1975), 25 C.C.C. (2d) 121, (Ont. C.A.).

146. *R. v. Wydryk & Wilkie* (1972) 2 W.W.R. 81 (B.C. C.A.).

147. See *Huard v. The King* 95 C.C.C. 393; [1949] Que. Q.B. 568 (1949 Que. C.A.).

148. See Haines, *Criminal and Civil Jury Charges*, 46 Can. B. Rev. 40, 74 (1968).

149. *Huard v. The King*, *supra* note 147.

150. *R. v. Stewart* (1969), 2 C.C.C. 244, 252-253, 66 W.W.R. 144, 5 C.R.N.S. 75 (B.C.C.A.).

151. *R. v. Wydryk and Wilkie* [1972] 2 W.W.R. 81 (B.C.C.A.); affirmed [1972] 3 W.W.R. 401 (S.C.C.).

152. *R. v. Dyson* (1971), 5 C.C.C. (2d) 401, 410 [1972] 1 O.R. 744 753 (Ont. S.C.).

153. *Criminal Code*, section 576.2.

154. *R. v. Barnard* (1971), 2 C.C.C. (2d) 564, (Ont. C.A.); *R. v. Babcock* [1967] 2 C.C.C. 235 (B.C.C.A.); *R. v. Ford* (1853), 3 U.C.C.P. 209; *R. v. Recalla* (1935) 64 C.C.C. 276, (Ont. C.A.).

155. (1785), 1 T.R. 11, 99 E.R. 944 (K.B.).

156. *R. v. Perras* (1974) 48 D.L.R. (3d) 145, 18 C.C.C. (2d) 47 (Sask. C.A.).

157. See, for example, F.R. Ev. 606 (b).