



JUDICIARY OF
ENGLAND AND WALES

TRIAL BY JURY – PAST AND PRESENT¹

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It is a pleasure to have been asked to give this year's Blackstone lecture. Lord Devlin at the outset of his Hamlyn Lectures in 1956 observed: that trial by jury was a subject on which it was not possible to 'say anything very novel or very profound'. If not a subject suitable for original comment, why did I choose it?

First, because it links to Blackstone himself. He was a fierce supporter of trial by jury. It was for him the '*sacred bulwark of the nation*', securing our liberty. He was not alone in his view.

For Lord Camden it was '*the foundation of our free constitution*'. For Lord Eldon the '*greatest blessing which the British Constitution had secured to the subject*'. For Lord Devlin, '*the lamp that shows that freedom lives*.' For Lord Judge, '*a safeguard against oppression and dictatorship*'.

For Lord Denning it was also "*the bulwark of our liberties*". In *Ward v James* a civil appeal, he stated that "whenever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake, or when one or other party must be deliberately lying, then trial by jury has no equal."

Yet, he went on to conclude that in personal injury cases trial by jury had given place to trial by judge alone, because, I quote: "*trial by a judge alone is more acceptable to the great majority of people. ...judges alone, and not juries, in the great majority of cases, decide whether there is negligence or not. They set the standard of care to be expected of the reasonable man.*" In the criminal courts, it is the jury who set the standards of the reasonable man and woman and decide issues of negligence. They decide far more complex issues than simple dishonesty. Is the distinction between criminal and civil trials one of principle or pragmatism?

¹ With thanks to John Sorabji for his assistance in preparing this lecture.

At the time Lord Denning gave judgement in *Ward v James*, not only had the right to jury trial almost vanished in civil actions, a combination of statute and judicial pronouncements had imposed considerable restrictions on what a jury in a criminal trial could hear by way of evidence and when a case was fit for them to determine.

Juries could not convict on the uncorroborated evidence of certain categories of witness. Trials were often stopped as an abuse of the process of the court if the allegations were historic. It was not easy to persuade a judge to allow a jury to try cases involving multiple counts, multiple complainants and multiple defendants. To give two examples from my own practice: my husband and I were instructed in the same case to be tried in Oxford of an alleged husband and wife bank robber. I was for the husband bank robber and my husband for the wife – the alleged get away driver. The judge concluded, for reasons I did not follow, that the wife could not get a fair trial with her husband and ordered separate trials. In another case I represented a man accused of raping two women. He had previous convictions for rape. The judge ordered separate trials, the jury were not allowed to know of his convictions or of the other complainant. He was acquitted.

Until the Criminal Justice Act 2003, save in clearly defined circumstances, the jury could not receive hearsay evidence or know of a defendant's bad character – for fear that they would be unable properly to assess its reliability or relevance. When they did learn of a defendant's bad character, in some cases, judges were required to give the jury what was called a modified 'good' character direction, absent which a conviction would be unsafe.

Cases were withdrawn from juries because the judge decided a complainant's evidence was unsatisfactory. For many years, a case called *R v Shippey* was in the text books as a guide to when a judge should stop a prosecution in its tracks. Shippey was charged with rape. The judge described the complainant's evidence as weak and inconsistent. He upheld a submission of no case to answer, stating that the authorities did not require that if parts of the prosecution evidence went to support the charge then it should be left to the jury no matter what the state of the evidence. The evidence should be assessed as a whole, *not the plums separated from the duff*.

But the law and practice changed. Arguably, confidence in jury trial is on a high. Jurors cannot be peremptorily challenged as they once were. They can be trusted to sit until they are 75 whereas judges appointed after 1995 must retire at 70. The jury pool has now been extended substantially to include those involved in the criminal justice system. That raises the interesting

possibility that I will reach official judicial senility in December 2019 but could be called for jury service for five years thereafter....

Juries are now trusted with far more information and responsibility. We may rarely use them in civil actions in this country, but elsewhere juries are empanelled in high profile inquests to consider highly complex and or sensitive issues e.g. Hillsborough. Juries in criminal trials routinely hear allegations of historic abuse, try multiple counts and allegations involving multiple complainants, hear evidence of a defendant's bad character, consider hearsay evidence and may convict on uncorroborated evidence Trial judges are encouraged not to usurp the function of the jury by withdrawing a case on the basis of their own assessment of the credibility of a witness. Recent judgments of the Court of Appeal suggest the removal of the plums and duff test from Shippey from the textbooks. Judges are no longer obliged to give a so called modified good character direction to a man with bad character. Essentially, juries are left far more to work out the reliability and credibility of relevant and admissible evidence for themselves.

In the light of those developments, it seemed to me it was time to challenge myself- the second reason for the choice of topic. Was Parliament in changing the laws of evidence and are we judges wrong to place so much faith in juries? Am I blinded by a romantic ideal?

If you google the right to jury trial, you will find many references to threats to the jury trial and ample material to support the cause of the critics of the jury trial.

The jury is seen by some as an unfair and time-consuming process, a 'luxury' placing an expensive burden on the state (albeit it operates in only 1% or 2 % of criminal cases). If you are a prolific shoplifter accused of stealing sweets from Tesco's should you have the right to demand jury trial at a cost of approximately £20,000?

The verdicts of a jury are unreasoned. Their verdicts may seem irrational if not perverse; see for example commentary on the acquittal of OJ Simpson. Jurors fall out with each other, they may complain of a colleague's personal habits or even personal hygiene or accuse each other of misogyny or racism.

Jurors have been known to misbehave. One serving on a trial involving allegations of racism went out, got drunk and ended up in a police cell for racially aggravated assault. Others have made approaches to the accused or to the advocates. In a fraud case at Southwark Crown Court in 2003, a female Juror sent to prosecuting counsel a bottle of champagne and a invitation to a dinner date with the question `` what does a lady need to do to attract your attention?''.

The ability of jurors to follow what goes on in Court has been questioned. This tends to arise with particular regularity in relation to complex company law and fraud trials. Many argue the vast majority of jurors are incapable of following the complexities of city trading or the complexities of expert evidence in a gross negligence manslaughter.

Even in simple cases jurors may appear to have difficulty following clear directions see for example: the Vicky Pryce trial. As I am sure you will remember Ms Pryce was convicted of taking her husband Chris Huhne's driving licence penalty points. Her defence at trial was marital coercion. The questions asked by the jury included:

"Can a juror come to a verdict based on a reason that was not presented in court and has no facts or evidence to support it, either from the prosecution or defence?"

"Can we speculate about the events at the time Vicky Pryce signed the form [accepting her husband's penalty points] or what was in her mind at that time?"

"In the scenario where the defendant may be guilty, but there is not enough evidence provided by the prosecution at the material time ... to feel sure beyond reasonable doubt, what should the verdict be? Not guilty or unable/unsafe to provide a verdict?"

The trial judge, one of the most experienced criminal lawyers in the country, observed that the jury's questions demonstrated 'absolutely fundamental deficits in understanding'. The trial prompted Joshua Rozenberg, the highly respected legal commentator, to ask whether this was the beginning of the end of our love affair with juries.

Increasingly, jurors have been known to ignore explicit directions on the use of the internet. We are at risk of what the then Attorney-General, Dominic Grieve QC, referred to as 'Trial by Google'.

Research by Professor Cheryl Thomas of UCL, one of the few academics in this country to take an interest in jury trial, suggests that 12% of jurors are looking for information on the internet concerning high profile cases, whereas in other cases this was 5%. This must be a cause of concern. One answer might be to sequester the jury with no access to the internet for the entirety of a trial but we do not sequester juries any more in this country and it is simply not practicable. The expense and inconvenience to the jurors would be unjustifiable.

Then of course there is the jury that goes off on an inexplicable frolic of its own. In the trial of *R v Young* the charge was murder and it was in the days when juries were on occasion sent off to a hotel, for fear they may succumb to outside pressure at a crucial time in their deliberations.

The judge did not give the jury express instructions forbidding the use of a Ouija board after dinner to try to contact the deceased's spirit to find out if the defendant murdered him...

It may not be surprising therefore, that Sir Louis Blom-Cooper QC described the jury as "the high point, the apotheosis, of amateurism. As such it is potentially a recipe for incompetence and unbridled bias.' Simon Jenkins observed: "jury trial should go the way of the ducking stool and be consigned to history along with 'manorial courts and vestrymen, by impressed constables, "pricked militias" and compulsory dog-catching'.

So, where does one find the *raison d'être* of the jury trial? Even the harshest critic must accept that jury trial was once essential.

Despite the right to trial by one's peers (literally one's peers) trailed in the Magna Carta, and the provisions of various statutes in which the great charter's principles were re-affirmed, the King remained all powerful in the courts. Judges held office at the pleasure of the sovereign. The Star Chamber was allowed to flourish to the extent that its name has become synonymous with oppression and the arbitrary use of power. In the 17th century in its struggle against the Stuart Kings, Parliament decided to pass the Habeas Corpus Act of 1640 to abolish the Star Chamber and re-affirm the right of the freeman not to be imprisoned without trial by his peers

But, the right remained worthless for so long as judges continued to believe that they could direct a jury as to their verdict and in accordance with the establishment's wishes. At that time the idea that there were three independent branches of state was not fully developed. The principle of separation of powers as we understand it, and later advocated by Blackstone, was not recognised. John Locke in his *Second Treatise of Government*, drew a distinction between legislator and executive but the judiciary do not figure in his early account of the separation of powers. One reason for this was the understanding, common at the time, that the judiciary was 'generally considered as a branch of the executive'. Thereby raising the prospect as Montesquieu put it, if joined with the executive, 'the judge might [then] behave with all the violence of an oppressor.'

Matters came to a head when two Quakers Penn and Mead faced charges of unlawful assembly. The trial judge did not take kindly to an independent minded jury that included a Mr Bushell. First he locked the jury up without food and water or chamber pot for days when they refused to reach a guilty verdict and then when they acquitted he fined them for contempt of court. Mr Bushel refused to pay the fine and remained in prison.

He applied for a writ of habeas corpus and was fortunate to find his case listed before Vaughan CJ of the Court of Common Pleas in court in which Sir William, Blackstone would later sit.

Vaughan held that a jury could return a verdict that it considered just and could not be punished by reason of the verdict it returned.

He said *'juries are not dominated by judges: [as] a dominated jury can only go through the motions and cannot act with that functional independence which distinguishes trial by jury from a de facto trial by judge alone.'*

This was a major milestone and the jury thereby entered the picture as the defender of individual liberty; the protector of human rights. By placing the power of conviction or acquittal in the hands of the public, albeit a limited public at the time, there was as sure a defence against oppressive action by the State against the individual as was possible at the time. While the enactment of cruel and arbitrary law may remain in the hands of legislator and executive, the jury was not obliged to give effect to it.

In an age before representative democracy it was the only real means for any form of genuine democratic involvement of the public in the running of the State. It was the only means by which the public could both ensure that the law was not used as a means of oppression, and express their view on the law itself. This was the point expressed clearly by Lord Erskine in his defence of Lord Gordon for the crime of High Treason arising out of what became known as the Gordon Riots. In Erskine words:

'Criminal justice in the hands of the people is the basis of freedom. While that remains there can be no tyranny, because the people will not execute tyrannical law against themselves. Whenever it is lost, liberty must fall along with it. . .'

The jury had considered the justice of the law of constructive treason and its use by the State, and found both wanting. It thus protected not just the individual, but also society generally.

Similarly, in the early nineteenth century, people were still being hanged for sheep, horse and cattle stealing and for robberies to the value of 40 shillings - raised in 1827 to £5. Juries deliberately undervalued goods stolen to avoid sending offenders to the gallows

Obviously, things have moved on. The independence of the judiciary has become accepted as an essential element of the rule of law and an established constitutional principle. The judiciary is not an aspect of the executive but a separate and independent branch of the State. We have long been a representative democracy. As such we now live in a society where Parliament, government and the laws that are enacted are subject to democratic accountability via the ballot box.

These developments prompted an article in 1878 by the American writer Charles Caverno. He took the view that trial by jury's day had passed. As he put it, it was *'high time that we looked [it] straight in the face – high time that we stripped it of the glamour in which it is clothed, brought from other ages and other circumstances.'* The safeguard against oppression and tyranny for him came from democratic government.

All jury trial had going for it – in his view – was its suitability as a means of 'protecting society against crime'. Even here he found it lacking concluding that jurors were simply not up to the job, they were too ignorant: the law was too technical, and they could be tampered with too easily. He much preferred trial by judge alone. As he might have put it, it is electoral accountability and representative democracy that are the bulwark of liberty today. The jury need no longer stand between the public and the State.

Caverno and his fellow critics of the jury may well have a point about the reduction of the jury's role as a guardian of liberty now that democracy has taken hold but the point only goes so far. We can accept Caverno's essential point that the jury's role has in general been overtaken by the development of the separation of powers and the birth and growth of democracy, without having to accept his conclusion that jury trial has lost its role as a safeguard against oppression or, to put it more positively: as a means to secure democracy, democratic participation and the Rule of Law. The Rule of Law and our legal system are pivotal to our democracy and our long term social and economic well being. The British public cannot afford to overlook their role, particularly, in the light of Brexit; the legal system will become even more crucial to our survival.

When we think of democracy we instinctively think about parliamentary and local elections. Democratic participation goes wider than this. Members of the public sitting on a jury act as the democratic branch of the judiciary. Jury service ensures that the citizen who does not have to vote, but does have to sit on a jury if called, is a part of the delivery of justice and that is in itself an aspect of participatory democracy.

Juries help to ensure that justice remains local and representative of society. It remains a regrettable fact that government in its broadest sense is not as representative of society as it could or should be. The judiciary is a case in point. While diversity has increased, work still remains to be done. Jurors however are properly representative of society. They continue to be drawn from local communities; a point of historic continuity between the original pre-Norman form of the jury and the modern jury. As research by Professor Thomas has shown juries

continue to be representative of local populations. Moreover, they are diverse. BAME jurors and female jurors are not under-represented.

When Jack Straw then Justice Secretary tried to curtail the right to trial by jury, there were protests from a wide range of citizens and organisations to the effect that a fair hearing from a randomly selected panel of jurors greatly enhances the confidence that minority communities have in the Justice system. According to the Bar Council, the plans would have hit black defendants hardest. Courtenay Griffiths, QC, of the Society of Black Lawyers, said that `` the evidence is that black defendants see Magistrates Courts as police Courts.

This response is important for two reasons. First, it demonstrates that in matters of serious criminal prosecution justice should not be seen as being dispensed from on high by what might today be described pejoratively as an unaccountable elite.

Second, it highlights a point previously noted by Lord Neuberger in a different context: the importance for prosperous societies to maintain inclusive State institutions. Drawing on work by two American scholars, he suggested that the countries that have the highest levels of economic prosperity have open and inclusive political institutions. They have institutions in which all members of society have a stake and play a part. Societies that do not thrive are those ruled by narrow elites who can maximise their opportunities to extract value from the State for their own ends. The most obvious means to achieve an inclusive society is through the development of strong democratic government. The jury is an aspect of such inclusivity. It is a partnership between professional judges and the public. As such it is not only, as one US writer put it, an example of the checks and balances of democratic design usually noted in bicameral legislatures, but it is an example of shared responsibility for the delivery of justice.

The jury trial promotes civic values. As Professor Thomas has noted, studies in the US have shown that jurors are more likely to vote in elections following completion of jury service. Undertaking jury service increases a juror's understanding of their role in civil society; of the crucial part they play in it, and in shaping the way in which they are governed. Jury service helps promote an understanding of how the legal system works and its importance to this country.

Jury trial thus increases participation in democracy generally through giving a central role to the public in the criminal justice system. It ensures that the public do not become estranged from the justice system. It helps maintain the health and vitality of our inclusive institutions, and the general health of our society.

It is also the democratic aspect of the judiciary of securing accountability.

When we think of accountability, we tend to think of what is generally referred to as sacrificial accountability, that is to say, the ability to remove someone from their position where they are found to be wanting. The judiciary are subject to this form of accountability through, for instance, the ability to remove a senior judge from office via an Address to Parliament and appellate review. Juries provide another form of accountability. They ensure that in each criminal trial it is not just the accused that are on trial. They ensure that the criminal process is itself in trial.

A jury may refuse to convict in spite of the law and the evidence because it concludes that the law is an unjust law. The jury passes its verdict on the law. Secondly, it ensures that the prosecution and the judge are on trial.

Some may remember the case of Dr Leonard Arthur a highly respected consultant paediatrician, a kind compassionate doctor who, as he saw it, put the interests of his patients and their parents first. John Pearson was born with Down's syndrome and abnormalities of his lung, heart and brain. Dr Arthur wrote in the case notes, "Parents do not wish the baby to survive. Nursing care only." He prescribed an opiate based painkiller to be given 'as required.' The baby died. Dr Arthur was reported to the authorities by a fellow member of staff, a staunch believer in the right to life. He admitted to the police that the effect of the drug given, apart from being a sedative, was also to stop the child seeking sustenance and that this was his intent. Dr Arthur was charged with murder, but the charge reduced to attempted murder during the trial because of problems with causation.

Despite what to the lawyer may have appeared a confession to the charge, the jury acquitted in hours. Their verdict has been construed as a refusal to convict a doctor of murder for 'allowing a severely handicapped baby to die' even if the law was against him. It brought to the public's close attention the dreadful dilemma of the doctor in this situation and triggered debate on the ethical questions involved

The case of Ponting a civil servant was another example – in the trial judge's view he had undoubtedly broken the Official Secrets act by passing on secret information to a politician but the jury refused to convict, upholding his claim that disclosure was in the public interest.

These trials all took place in the full glare of publicity. Here we see a specific application of the principle of open justice: the public can attend court and scrutinise what is going on. They can see the jury make its protest as to what they see as an unjust law or unjust application of the law. There is a check against arbitrary or oppressive conduct by the court. Here the 17th century rationale lives on despite Caverno's claim. We see as Professor Zander has properly pointed out the jury can set aside 'unjust laws, oppressive prosecutions and harsh sentences.'

That juries can do this has not always been met with approbation. Sir Robin Auld in his review of the criminal courts in 2001, noted that it cannot be right for a jury of twelve to set aside a law properly enacted by Parliament by refusing to apply it. Sir Robin's point, and there is some force in it, is that it appears illogical for to trump the view taken by Parliament, which is elected by and responsibility to the whole electorate. It contravenes Parliamentary sovereignty.

One answer to Sir Robin's and similar arguments is that the jury, as I noted earlier, is an aspect of the checks and balances of democratic design. It is one that draws its legitimacy from the electorate itself, rather than from a professional judge. As Alexis de Tocqueville commented: the 'jury . . . [is] *as direct and as extreme a consequence of the sovereignty of the people as universal suffrage.*' It is a check against the authority of government and Parliament, which ensures that they take heed of the judgment the public passes on what they do. It is the means by which individuals can 'feel that the law is theirs', that the law reflects and continues to be consistent with the 'attitudes and mores' of society generally.

Juries provide legitimacy to a court's decisions. There is strength in numbers. To convict in most jury trials ten people brought together with all their varied experiences must agree as opposed to one possibly case hardened judge. The Diplock courts in Northern Ireland, for some a great success, were criticised by others on the basis that defendants should not be convicted of serious crimes on the judgement of one man alone.

I turn then to my next topic: the jury as a truth-seeker. The common law has traditionally adopted an adversarial approach to truth-seeking; a product of developments in the 17th and 18th centuries. Civilian law systems adopted a different approach; a more investigative approach. At one time the jury did have an investigative role, but that was lost in its pre-history. As a means to reach correct decisions, the jury is now firmly one where it is the recipient of evidence and argument just as the judge is in a civil trial.

Might a professional judge be better, more competent as Simon Jenkins and others have suggested? Answering this question tends to rely considerably on anecdote, or perhaps prejudice.

Critics of juries in long fraud trials blame the collapse of some high profile trials on the jury system. Yet, if you analyse what went wrong, the fault for the most part seems to have lain not with the jurors but elsewhere. One also has to question why if a prosecution of a criminal offence is so complex that only a highly educated and trained professional will follow— has it been brought? Fraud offences are defined by the standards of ordinary people and prosecutions

should be intelligible to the public. If the prosecution cannot explain in sufficiently simple terms why they say someone has behaved dishonestly, is a prosecution for a criminal offence punishable with imprisonment justified?

When it comes to decision making I ask rhetorically where is the evidence the quality of the professional judge is better when it comes to deciding if someone was dishonest or suffering from diminished responsibility? A study by two US scholars – Kalven and Zeisel suggested it is not. They examined the extent to which judges and juries reached the same verdicts. In fifteen of twenty cases they agreed. Of the five other cases: in one the jury failed to reach a verdict, and in the other four the jury acquitted when the judge would have convicted. If that is the only difference between them may I remind you of Blackstone's theory: that it "is better that ten guilty persons escape than that one innocent suffer"

Care, of course needs to be taken, given differences between the US and England and Wales and are respective justice systems but would greater research would reveal that judges are no better at spotting a liar than the lay juror?

I do not therefore accept that the jury's questions in Vicky Pryce's trial, or allegedly perverse acquittals, even if they are examples of jury incompetence, demonstrate a universal truth. It is all too easy to start from the premise that juries are incompetent and then from the thousands of jury trials taking place daily worldwide to extrapolate a principle that juries are inefficient amateurs.

Recent empirical studies support the idea that juries carry out their role effectively. Studies by Professor Thomas have demonstrated an absence of jury bias or discrimination. They have shown that few juries fail to understand or appreciate the nature of their role and that less than 1% of juries fail to reach a verdict. In other words, where evidence is gathered it strongly supports the viability of jury trial.

This is not to say that in some cases exceptions can and should properly be made. Jury tampering and the trial of R v Hussain is a case in point. The case concerned allegations of manslaughter and conspiracy to commit fraud by false representation. During his summing up Mr Justice Goss became aware of an attempt to tamper with the jury. He took the exceptional step of discharging the jury and continuing to decide the case as judge alone. He approached the task as if he were a juror but delivered a reasoned verdict, putting out of his mind any inadmissible material of which the jury were unaware. The basis for his verdicts was understandable to all; unlike, some would retort, a jury verdict.

I concede the force in the retort, but to my mind this advantage does not outweigh the advantages of jury trial. In any event, the summing up provides us with the basis of the jury's reasoning and increasingly judges use written directions and steps to verdict that provide a clear audit trail of the jury's conclusions.

More importantly moving to a system of judge-only reasoned verdicts would eliminate the democratic participation in the criminal justice system. It would mark an estrangement between the public and that system; one which I do not believe would benefit society. We would lose the advantages it brings. The place for a judge-only verdict is as an exception to the general rule justified by the wider need to secure the proper administration of justice.

Conclusion

Having discussed the jury trial past and present at a canter, that leaves the question should the jury trial survive into the future? I do not advocate a return to trial by jury for civil cases- for principled and pragmatic reasons. It is not necessary, the system could not cope and we need the consistency of damages awards that judges bring. The US experience, where the right to jury trial is embedded in the sixth amendment to the constitution and still available for many civil trials, is not promising. I **do** advocate a continued role for the jury in criminal trials of sufficient seriousness to society or to the individual accused to justify the use of resources.

But, I accept too much depends on anecdote. Too much depends on prejudice– the examples I have given of jury misconduct or alleged incompetence are a mere handful compared to the many thousands of jury trials that take place every year.

We need more academic research and what better place to mention it than here in Oxford. Empirical scrutiny of our jury trials remains an under-developed area. If we are to ensure that trial by jury remains a robust, a central, and democratic aspect of our criminal justice system well into the 21st Century, it cannot remain under-developed.

In the meantime, I believe the answer to the question should the jury trial survive was given by the late and truly great Lord Bingham in his lecture "The English Criminal Trial: Credits and Debits". He began with a reference to Oliver Cromwell's instruction to his portrait painter that the portrait should be "*roughnesses, pimples warts and everything else you see*". He described the principal pimples and the warts of the criminal trial. He concluded "*serious though these warts ... are I think they can be treated by medical means. I do not think they call for heroic transplant surgery.*"

By taking medical means, simple sensible steps such as removing the right to elect trial by jury in cases that simply do not warrant it, simplifying, streamlining and case managing jury trials

effectively (as the judiciary has been doing in recent years with conspicuous success), better jury communication (as recommended by Professor Thomas), and with luck, we should keep alight “*the lamp that shows that freedom lives*”.