# Summing-up to Juries in Criminal Cases—What Jury Research says about Current Rules and Practice

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**Summary:** *The rules which govern the way in which judges sum up to juries in criminal cases and existing judicial practice are largely based on uninvestigated assumptions about jury fairness and competence. This article reviews the relevant jury research and points to aspects of the current rules and practice that warrant reconsideration and refinement.*

## Introduction

There is no sure method of assessing the extent to which the substantive results produced by the system of trial by jury are right. So concerns about the appropriateness of trial by jury focus largely on how juries go about deciding cases.

A criminal jury needs assistance from the judge to decide a case on the evidence and within the appropriate legal framework. This assistance is primarily provided when the judge sums up. Judges develop some feel for the way that juries operate. But this feel is based on too little hard evidence for judges to be confident that what they say when summing up is understood[1] or acted on by jurors. Further, many of the rules applicable to summing up are based on uninvestigated assumptions about juries. So it is plausible to assume that the criminal trial process would be more effective if the way in which judges sum up and the associated rules were refined in light of empirical evidence based on research into jury behaviour.

This article explores what jury research indicates as to the rules that govern the way judges sum up and the effectiveness of summing up techniques. The discussion is focused on practice in England and Wales, Australia and New Zealand.

[1] Judges usually believe that juries understand at least most of the directions they give, see for instance Zander and Henderson, *The Crown Court Study* (Royal Commission on Criminal Justice Research Study No.19) HMSO (1993) p.216. This is not true of all directions. For instance many judges are sceptical about juror comprehension of provocation directions, see for instance *Rongonui* [2000] 2 N.Z.L.R. 385 at 445.

## Jury research

Jury research has long been carried out in the United States of America. During the 1950s and 1960s, the University of Chicago carried out its well-known jury project.[2] Since then, there has been an avalanche of published material.[3] The role of the judge in most American jurisdictions differs significantly from that adopted by judges in other jurisdictions and this limits significantly the value of the American material. Some of the results are, nonetheless, of general application.[4]

In England and Wales, common law contempt of court rules and, more recently, s.8 of the Contempt of Court Act 1981 have severely limited the scope for research involving real juries. So jury research has largely been confined to work with simulated[5] and shadow[6] juries and general tests of comprehension which, to a greater or lessor extent, mimic the circumstances of a criminal trial. For ease of reference, all subjects of such studies will be described in this article as mock juries or mock jurors. As well, there has been research involving inquiries of other participants in the trial process. To the limited extent that juror views have been sought, this has been at a general level without detailed focus on actual deliberations in particular cases.

Six jury research projects in England and Wales have utilised mock juries or jurors or have involved direct contact with actual jurors:

1. A jury project conducted by the London School of Economics in the late 1960s and early 1970s.[7] The methodology (based on one of the approaches used in the Chicago Jury Project) involved simulated juries listening to tape-recorded re-enactments of trials based on the transcripts of two real trials. The "deliberations" of the simulated jurors were recorded.
2. Research carried out by Oxford University Penal Research Unit. This involved a study of actual criminal trials, interviews with people involved in the cases (police officers, counsel, solicitors and sometimes the judge) and the use of "shadow" juries whose deliberations were monitored. The primary focus was on acquittals.[8]

[2] Broeder, "The University of Chicago Jury Project" (1959) 38 Nebraska L.R. 744. Kalven and Zeisel, *The American Jury* (1966) was one of the many products of this work.

[3] A thorough list of the major publications appears in App.V to Sir Robin Auld's *Review of the criminal courts of England and Wales: Report* London HMSO (2001).

[4] A point made in a research paper commissioned for the Auld *Review*, Darbyshire, Maughan and Stewart, *What can the English legal system learn from jury research published up to 2001?* p.1.

[5] A simulated jury "hears" a mock case, perhaps by listening to an audio-tape or watching a video which records performances by actors.

[6] A shadow jury is selected by the researchers and "hears" a real case by sitting in court throughout the proceedings.

[7] Cornish and Sealy, "Juries and the Rules of Evidence" [1973] Crim.L.R. 208 and Cornish and Sealy, "Jurors and their Verdicts" (1973) 36 M.L.R. 496. This project is also discussed in App.C to The Law Commission's Consultation Paper No.141, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996).

[8] McCabe and Purves, *The Jury At Work* (1972), McCabe, "Jury Research in England and the United States" (1974) 14 L.N.J. Crim. 276, McCabe and Purves, *The Shadow Jury At Work* (1974) and McCabe, "Discussions in the Jury Room: Are they like this?" in Walker (ed.), *The British Jury System* (1975).

3. Research commissioned by the Fraud Trials Committee (presided over by Lord Roskill) which reported in 1986.[9] This research was carried out by the MRC Applied Psychology Unit at Cambridge.[10]
4. *The Crown Court Study*[11] carried out for Lord Runciman's Royal Commission on Criminal Justice,[12] which reported in 1993. This study involved surveys of jurors and other trial participants.
5. Research using simulated juries commissioned by the Home Office in 1995 and conducted by the Centre for Socio-Legal Studies at the University of Oxford.[13]
6. Research involving a simulation of the Maxwell fraud trial with mock jurors.[14] The purpose of this project was to test the comprehension abilities of the mock jurors.

Several research projects involving surveys of jurors or mock jurors have been conducted in Australia.[15] As well, there has been an intensive study in New South Wales (which included juror interviews) focusing primarily on the effects of prejudicial pre-trial publicity but which also addressed the experiences of jurors in the 41 cases examined.[16]

A recent New Zealand research project involved close analysis of 48 trials including detailed interviews of many of the jurors who sat on those cases.[17] This research was commissioned by the New Zealand Law Commission and was carried out with the approval of the Chief Justice and the Chief District Court Judge and the sanction of the trial judges in the 48 cases examined.[18] For each of these cases the researchers conducted an initial survey of those summoned for jury service

[9] *Fraud Trials Committee Report* HMSO (1986).

[10] Fraud Trials Committee, *Improving the Presentation of Information To Juries in Fraud Trials—A Report of Four Research Studies*, by the MRC Applied Psychology Unit, Cambridge HMSO (1986), henceforth "MRC Applied Psychology Unit". These studies are discussed by Honess, Levi and Charman, "Juror Competence in Processing Complex Information: Implications from a Simulation of the Maxwell Trial" [1998] Crim.L.R. 763.

[11] See n.1.

[12] Cm.2263.

[13] See App.D to The Law Commission's Consultation Paper No.141, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996) and Lloyd-Bostock, "The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study" [2000] Crim.L.R. 734.

[14] Honess, Levi and Charman.

[15] New South Wales Law Reform Commission, *The Jury In A Criminal Trial* (1986) at pp.3–7. Findlay, "Juror Comprehension and Complexity" (2001) 41 L.N.J. Crim. 56 and Nathanson (1996) 38 Crim.L.Q. 217 at 229–230. Other unpublished research is referred to by Eames, "Towards a Better Direction—Better Communications with Jurors", a paper delivered at the Supreme Court and Federal Court Judges Conference, Adelaide, January 2003.

[16] Chesterman, Chan and Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001), a report prepared for and published by the Law and Justice Foundation of New South Wales.

[17] The results of the research have been published by the New Zealand Law Commission as preliminary paper 37, vol.2, *Juries in Criminal Trials, Part 11 A Summary of the research findings* (1999). The authors (and principal researchers) were Warren Young, Neil Cameron and Yvonne Tinsley. Future references to this paper are to "Young, Cameron and Tinsley".

[18] There is no New Zealand equivalent to s.8, Contempt of Court Act 1981 (UK). But the position at common law is not dissimilar, see *Solicitor-General v Radio New Zealand* (1993) 10 C.R.N.Z. 641. For the reasons why the research was seen as consistent with the New Zealand contempt of court rules, see Young Cameron and Tinsley, at pp.*ix–xi*.

(focusing on pre-trial knowledge of the cases selected for study), sat in on the early stages of the trial, obtained copies of the notes of evidence, observed the addresses of counsel and observed and tape recorded the summing up. After the jury retired, the researchers interviewed the trial judge. As soon as possible after the verdict, they interviewed jurors. On average, five or six of the jurors from each trial were interviewed.[19]

There is also other relevant published material to which reference can usefully be made: a report of study carried out by Professor JW Montgomery as to the impact on individuals of different formulations of the beyond reasonable doubt formula[20]; the report of a similar study carried out by Professor Michael Zander[21]; reports of Canadian work involving juror surveys and mock juries[22]; the results of extensive work involving assessments of jury verdicts based on surveys or interviews of others involved in the process[23]; and many published articles that record, on an anecdotal basis, the experiences of particular jurors.[24]

**Effect of jury research on the practice of judges**

There are a number of judgments (from not only New Zealand but also other jurisdictions) in which particular reference has been made to the most recent New Zealand research.[25] As well, jury research was referred to in the Fraud Trials Committee's 1986 report,[26] the 1993 *Report of the Royal Commission on Criminal Justice*,[27] Sir Robin Auld's 2001 *Review of the Criminal Courts of England and Wales*,[28] and the Law Reform Committee of Victoria's 1997 report, *Jury Service in Victoria*.[29] Understandably, the New Zealand Law Commission relied on the New Zealand (and other) research in its final report on juries.[30] Currently a committee established by the Australian Institute of Judicial Administration is examining what

[19] See Young, Cameron and Tinsley, paras 1.6–1.7.

[20] Montgomery, "The Criminal Standard of Proof" (1998) 148 N.L.J. 582.

[21] Zander, "The Criminal Standard of Proof" (2000) 150 N.L.J. 1517.

[22] Law Reform Commission of Canada, *The Jury in Criminal Trials*, Working Paper 27 (1980), Schaefer and Hansen, "Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation" (1990) 14 Crim.L.J. 157 and Bagby, Parker, Rector and Kalemba, "Racial Prejudice and the Canadian Legal System" (1994) 18 *Law and Human Behaviour* 339.

[23] Zander, "Are Too Many Professional Criminals Avoiding Conviction?—A Study of Britain's Two Busiest Courts" (1974) 37 M.L.R. 28, Baldwin and McConville "The Acquittal Rate of Professional Criminals: A Critical Note" (1974) 37 M.L.R. 439, Zander, "The Acquittal Rate of Professional Criminals: A Reply" (1974) 37 M.L.R. 444 and Baldwin and McConville, *Jury Trials* (1979).

[24] These are referred to and analysed by Darbyshire, Maughan and Stewart at pp.43–57.

[25] *Rongonui* [2000] 2 N.Z.L.R. 385 at 445; *H* [2000] 2 N.Z.L.R. 581 at 589; *McLean (Colin)* [2001] 3 N.Z.L.R. 794 at 802; *Burns (Travis) (No.2)* [2002] 1 N.Z.L.R. 410 at 413; *Haines* [2002] 3 N.Z.L.R. 13 at 20; *Zoneff* (2000) 200 C.L.R. 234 at 261; *Ex p. The Telegraph Group plc* [2001] 1 W.L.R. 1983 at 1992 and *Montgomery v HM Advocate* [2001] 2 W.L.R. 779 at 809–810.

[26] See App.A.

[27] Cm.2263, pp.2 and 132, where the desirability of research and amendments to s.8, Contempt of Court Act were mentioned and at pp.134–136 and 143, referring to the results of *The Crown Court Study* which it had commissioned.

[28] There are numerous references to jury research, particularly in Chs 5 and 11, see for instance pp.157–159 and 164–68.

[29] Vol.3, particularly Ch.2.

[30] Report 69, *Juries in Criminal Trials* (2001).

constitutes best practice as to summing up in light of, *inter alia*, current jury research.[31]

Jury research has perhaps contributed to the increasing use by judges of written material when directing juries. It has certainly encouraged judges in New Zealand to give reasonably elaborate directions and advice at the commencement of trials and, in some cases, to provide juries with transcripts of the evidence. Further, the New Zealand research has assisted courts to dismiss arguments associated with prejudicial publicity. However, overall the effect of jury research on contemporary judicial practice has been limited. This is a function of lack of awareness of the extent of the research and scepticism as to its utility.

Much of the research is comparatively inaccessible and there is a resulting lack of judicial awareness of the extent of the material available.[32] There is also scope for doubt as to the practical relevance of much of what has been written. Mock juries do not have the responsibility of making real decisions and are not exposed to real defendants and victims.[33] Often the environment in which mock jurors have been studied bears little resemblance to real trials. The value of research based on surveys or interviews of actual jurors is dependent on the self-awareness and candour of the jurors.[34] Perhaps most importantly, the process of trial by jury involves infinite variables and it is accordingly difficult to extrapolate generally from the way in which a few real or mock juries have behaved in particular circumstances.

Nonetheless, the comparatively slow take up by the judiciary of the results of jury research is unfortunate. The current jury system is not perfect. Perverse verdicts have serious consequences for those immediately affected and society as a whole. It would be vain to assume that current judicial practice is incapable of improvement. The incidence of perverse verdicts is likely to be reduced if judges can be more effective in ensuring that juries decide cases in accordance with the law and the facts. So it would be foolish to ignore research material which might assist judges to be more effective. It might also promote better outcomes if the rules governing the way judges sum up which are based on uninvestigated assumptions about jury behaviour were re-evaluated in light of empirical evidence.

## Some general observations

It is widely thought that trial by jury could not withstand serious empirical research.[35] The rules precluding investigation into jury deliberations are associated with this fear. As well, general concerns about jury competence underpin restrictive

[31] Eames, at pp.4–5.

[32] A similar point is made by Darbyshire, Maughan and Stewart, p.1. Many of those with a genuine interest in jury research are unaware of the extent to which such research has been carried out.

[33] Researchers customarily report that their simulated juries appeared to take their "responsibilities" seriously, see Cornish and Sealy [1973] Crim.L.R. 208 at 210. But there is certainly room for doubt as to the extent to which conclusions can safely be drawn from the behaviour of mock juries, see for instance the discussion in Baldwin and McConville, pp.12–15.

[34] There are some indications of lack of candour or perhaps self-awareness on the part of those participating in simulated juries, see for instance App.D to The Law Commission's Consultation Paper No.141, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996), p.338.

[35] See, for instance, Sir John Smith, "Is Ignorance Bliss? Could Jury Trial Survive Investigation?" (1998) 38 Med.Sci.Law 98.

rules applicable to summings up. It is easy to come up with specific instances of jury misconduct that might be thought to justify such concerns: a jury deciding a case with the toss of a coin[36] and jurors in a murder trial consulting the deceased via an ouija board during the jury's retirement.[37] Against that background, the published jury research presents a mixed picture. The deliberative processes of juries can be rough and ready and the results sometimes have a hit and miss quality.[38] On the other hand, juries are generally conscientious and their collective powers of recall, comprehension and discernment are considerable.

Studies which have analysed jury verdicts as against the views of others involved in the trials have shown significant variations in the percentages of verdicts that are regarded as unsatisfactory by the researchers.[39] That is not surprising, as each set of researchers has used different categorisations (ie "wayward", "perverse" "unexpected" and "questionable") and applied different criteria. It is fair to conclude from the research that perverse verdicts (usually, but not always, acquittals) are far from infrequent but not so frequent as to give rise to widespread public demand for change.

Is the propensity of jurors to convict or acquit generally or in particular circumstances affected by the age, gender, race and socio-economic status of jurors and the corresponding factors affecting the defendant and other significant protagonists (*e.g.* the victim) in a case?

There is no room for doubt that such factors (along with the underlying personality style of a juror and his or her life experiences) sometimes create a predisposition to convict or acquit.[40] Reassuringly, however, research shows that the evidence given at trial is by far the most influential factor affecting jurors.[41] When individual jurors seek to introduce extraneous considerations, the jury collectively usually reverts to the real issues.[42] So individual juror predisposition to convict or acquit should be of comparatively little ultimate significance providing there is

[36] *Vaise v Delaval* (1785) 1 Term Rep. 11; 99 E.R. 944.

[37] *Young* [1995] 2 W.L.R. 430. The deceased contended, via the ouija board, that the accused was guilty.

[38] The shadow juries used by the Oxford University Penal Research Unit differed from the real juries in 25 per cent of the cases in which both juries reached verdicts, see McCabe and Purves, *The Shadow Jury at Work*, pp.18–19.

[39] McCabe and Purves, *The Jury At Work*, pp.32–38 assert that 13 per cent of jury acquittals (representing 8.8 per cent of all acquittals including directed acquittals) in the cases studied were "wayward". Zander (1974) 37 M.L.R. 28 at 50 categorised 6 per cent of the acquittals (including directed acquittals) in the cases he studied as "perverse" or "unexpected". Baldwin and McConville regarded 36 per cent of acquittals and 6 per cent of the convictions in the Birmingham cases studied as being "questionable". Of the 48 trials studied in the New Zealand research, six resulted in hung juries. Of the 42 trials which produced verdicts, the researchers were of the view that three sets of verdicts were "perverse or questionable" (one compete acquittal, one case where there were acquittals on all but one count and one case where there convictions on most counts), see Young, Cameron and Tinsley, para.9.9. There were also five cases involving multi-count indictments where the verdicts were compromises and, in three of these cases, jurors acknowledged "horse-trading", see paras 9.5–9.8.

[40] Darbyshire, Maughan and Stewart, pp.12–20.

[41] Darbyshire, Maughan and Stewart, p.12.

[42] Young, Cameron and Tinsley, paras 6.14, 7.9–7.10 and 7.56. On the other hand it appears that extraneous considerations were influential in "a couple of cases" in producing a perverse verdict and a hung jury (see para.6.11).

sufficient diversity in the makeup of the jury as a whole to enable such idiosyncrasies to be swamped by the collective will of the jury.[43]

The extent to which juries are adequately diverse (and the related question whether they are adequately representative of society) have been much investigated.[44] It seems plausible to assume that significant changes in jury composition (for instance resulting from changes in rules as to jury eligibility or changes in practice as to who is summoned for jury service) would be associated with changes in overall patterns of jury verdicts. In small scale studies it has not been easy to demonstrate a clear link between jury composition and verdicts,[45] save for a tendency of those of a particular racial or linguistic group to judge defendants of the same group less harshly than those of another group.[46] Large-scale American studies into the racial demographics of jury composition show close relationships between racial demography and jury verdicts.[47]

Juries are usually diligent and do their best to come to the right conclusion and this generally within the legal framework identified by the judge.[48] But can jurors truly understand and comply with the legal directions that the judge gives and determine cases in accordance with the evidence?

Self-assessments by jurors of comprehension and recall are generally positive.[49] This is consistent with research with mock jurors in the United Kingdom which suggests that a substantial majority of those eligible to be summoned for jury service have the ability to comprehend complex factual issues if given adequate assistance to do so.[50] As well, the Oxford University Penal Research Unit's shadow juries were able, collectively, to recall the evidence in the cases that they heard.[51]

On the other hand it is clear that that some jurors do not engage in a rational consideration of the evidence or become distracted by irrelevancies.[52] Further, there are grounds for belief that many of the more competent people who are summoned for jury duty manage to avoid actual service and that this is particularly likely to happen for lengthy trials.[53] If so, long cases (which call for higher than average jury

[43] A point made by McConville and Baldwin, p.105.

[44] See Darbyshire, Maughan and Stewart, pp.2–10.

[45] See for instance Cornish and Sealy (1973) 36 M.L.R. 496. McConville and Baldwin were not able to identify consistent patterns of association between jury composition and questionable verdicts (see pp.99–105).

[46] Bagby, Parker, Rector and Kalemba.

[47] These studies are reviewed by Darbyshire, Maughan and Stewart, pp.16–17.

[48] This is very apparent from the New Zealand research, see Young, Cameron and Tinsley, paras 7.9–7.11.

[49] Zander and Henderson, pp.205–210, 212–213 and 216–217 although *cf.* the handful of instances referred to at p.244 where a significant number of jurors were seen by other juror as not up.to the task. The Australian research is broadly to the same effect, see Eames, at p.6 and Findlay at pp.63, 64–65, but *cf.* what is said at p.66 as legal terms, scientific evidence and complex facts. Canadian jurors also were positive as to their ability to understand the evidence, see Law Reform Commission of Canada, at p.8.

[50] Honess, Levi and Charman, p.771. *Cf*. the conclusion of the Fraud Trials Committee that "the most complex of fraud cases will exceed the limits of comprehension of members of a jury" (see their report, p.142). Honess, Levi and Charman, at pp.764–765 make a powerful argument for the view that the MRC Applied Psychology Unit studies commissioned by the Fraud Trials Committee do not justify that conclusion.

[51] McCabe and Purves, *The Shadow Jury At Work*, pp.32–33.

[52] See Chesterman, Chan and Hampton, paras 475–484 and Darbyshire, Maughan and Stewart, pp.53–54.

[53] Sir Nicholas Phillips, "Challenge for Cause" (1996) 26 V.U.W.L.R. 479 at 493–497.

competence) are likely to be tried by juries whose collective competence is less than average.

Against that background, the results of the New Zealand research were reasonably predictable. Some of the New Zealand jurors had intellectual limitations or incomplete grasp of English. In 14 out of 48 cases there was at least one juror who did not have sufficient competence to assess the evidence. Other jurors misinterpreted the directions they were given, laboured under other significant misapprehensions or were influenced by extraneous considerations. Occasionally juries, collectively, lacked the competence to deal with complex technical evidence. In most cases, however, the competent jurors carried the incompetent and individual misunderstandings were corrected by other jurors or when further directions were sought from the judge.[54]

Overall, the research therefore suggests that the strength of the jury system lies in the collective understanding, recall and diligence of the jury as a whole and that in most (but not all) cases, inadequacy, misunderstanding, predisposition or prejudice on the part of individual jurors do not adversely impact on the ultimate determination.

Plainly there are imperfections in the system. A significant proportion of acquittals and a much smaller proportion of convictions are highly suspect. A perverse verdict may result from a jury consciously setting out to decide the case outside the legal framework identified by the judge.[55] Sometimes the random nature of jury selection produces a jury without sufficient unprejudiced and competent jurors to ensure that a rational approach is taken. Occasionally, the complexity of a case is beyond the collective competence of the jury. These risks are inherent in the jury system.[56] But a wayward verdict is perhaps more likely to result from the jury misunderstanding either the law or the evidence. It follows that if such misunderstandings can be avoided, the likelihood of perverse verdicts is much reduced.

As well, more is at stake than just outcomes. In the New Zealand cases, the juries generally produced acceptable verdicts but did so through processes that were often inefficient. Much time and effort was wasted by juries trying to recall the directions of the judge and the key elements of the evidence. These efforts in the end were largely (but not always) successful. Leaving aside the few cases in which juror misunderstandings affected verdicts, the procedural inefficiencies were still unfortunate. For instance, time and effort spent on recreating the directions or in agreeing on what the evidence was could have been better spent addressing the actual issues. More generally, jury service can be a harrowing experience.[57] It is self-evidently unfair to require juries to decide serious cases without giving them the assistance that they reasonably require if they are to do so efficiently.

[54] Young, Cameron and Tinsley, paras 3.18 and 7.12–7.25. The researchers were of the view that legal errors by juries resulted in hung juries or questionable verdicts in four cases.

[55] Instances of this are discussed in the Auld *Review*, pp.173–176. See also Vidmar (ed.), *World Jury Systems* (2001), pp.87–89.

[56] Some steps can be taken to lessen to mitigate these risks, for instance the jury screening carried out for the Maxwell fraud trial, see Lloyd-Bostock and Thomas, "The Decline of the 'Little Parliament'; Juries and Jury Reform in England and Wales" (1999) 62 *Law and Contemporary Problems* 7 at 18–19.

[57] Chopra and Ogloff, "Evaluating Jury Secrecy: Implications for Academic Research and Juror Stress" (2000) 44 Crim.L.Q. 190 at 218–220.

## The rules and principles which govern the way judges sum up

*Uninvestigated assumptions and empirical evidence*

There are a number of rules and principles that govern the way in which judges sum up. These include the rules and principles as to:

1. how judges direct juries on the concept of proof beyond reasonable doubt;
2. what judges may say when the defendant has not given evidence; directions as to the circumstances in which juries may treat lies as evidence of guilt; and
3. limited admissibility directions.

To a greater or lesser extent, these rules and principles are all associated with assumptions as to jury behaviour. In light of this, it is of interest to review what jury research indicates as to these assumptions and the way in which the relevant rules and principles operate in practice.

*How judges direct juries on the concept of proof beyond reasonable doubt*

The degree of proof required to meet the criminal standard was explained by Denning L.J. in *Miller v Minister of Pensions*[58]:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice."

On one side of the line is "reasonable doubt" that warrants acquittal. On the other side lie "fanciful possibilities" and "a remote possibility" of innocence which can be "dismissed" as "not in the least probable"—possibilities which do not stand in the way of conviction. It is all very uncertain. Yet most judges[59] would accept, at least for themselves, Denning L.J.'s formulation of the concept of proof beyond reasonable doubt and would view its inherent indeterminacy as inevitable.

In England and Wales, judges have been reluctant to discuss this indeterminacy with juries. So judges, when summing up, focus on what is required to justify conviction as opposed to what justifies acquittal.[60] A standard formula is along the lines that a jury should only convict "if the prosecution has made you sure of the defendant's guilt". Often the wording "satisfied so that you are sure" is used. Judges do not elaborate on the meaning of "reasonable doubt" (except perhaps if specifically asked by the jury in which case a judge might say that a reasonable doubt

[58] [1947] 2 All E.R. 372 at 373.

[59] This is not true of all judges. Some judges see 100 per cent certainty as required, see Zander (2000) 150 N.L.J. 1517 at 1519. For American views, see n.72, below.

[60] See *Kritz* [1950] 1 K.B. 82 and *Summers* (1952) 36 Cr.App.R. 14. In the latter case, Lord Goddard C.J. suggested a form of words to the effect that the jury should be told that it "must feel sure and must be satisfied" of guilt in order to convict.

is the sort of doubt which would affect a juror in dealing with matters of importance in his or her own affairs).[61]

In Australia, judges direct juries that the prosecution must establish beyond reasonable doubt that the defendant is guilty and that the defendant is entitled to the benefit of any reasonable doubt and does not have to prove his or her innocence.[62] If the prosecution case is circumstantial, it may be necessary to tell the jury that it must acquit if the facts proved leave innocence as a reasonable possibility.[63] However leaving aside cases which call for special directions or where juries ask questions, it has been said to be "positively mischievous" to elaborate on or explain the standard directions.[64]

In New Zealand, there is no absolute prescription as to how judges should explain the standard of proof to juries. Judges usually tell jurors that they will be satisfied beyond reasonable doubt if they "feel sure" or "are sure" that the defendant is guilty.[65] Judges also usually indicate that a reasonable doubt is a doubt that the jury regards as reasonable in the circumstances of the case. Further elaboration is seen as undesirable.

None of the formulations are free from difficulty. The certainty implied by the words "satisfied so that you are sure" or even just "sure" does not fit altogether easily with the uncertainties implicit in the phrase "reasonable doubt". Jurors have difficulties with the phrase "reasonable doubt" when it is not explained or elaborated on.[66] However the standard New Zealand elaboration is itself problematical as the elasticity in a doubt that is regarded by a jury as reasonable might be thought to be inconsistent with the word "sure".

It is plausible to assume that the higher the degree of required certainty which is conveyed by the judge's summing up, the greater the likelihood of an acquittal. Research evidence is at least generally consistent with this assumption.[67]

The approach in England and Wales, involving the use of the word "sure" and particularly if it comes in the form of the "satisfied so that you are sure" formula and the usual absence of elaboration as to reasonable doubt, sets a very stringent standard for the prosecution. In Professor Montgomery's study, 73.5 per cent of those surveyed took the "satisfied so that you are sure" formula to require 100 per cent confidence of guilt.[68] Publication of these results led to Professor Zander carrying out a broadly similar study.[69] In his study, the formula used was:

> "Only convict if the prosecution have made you sure of the defendant's guilt [which is the same as proving the case beyond reasonable doubt]."

[61] See *Walters* [1969] 2 A.C. 26 and *Archbold* (2003), para.4.385.

[62] See *Reeves* (1992) 29 N.S.W.L.R. 109 at 117.

[63] See for instance *Knight* (1992) 109 A.L.R. 225 at 230.

[64] *Reeves* (1992) 29 N.S.W.L.R. 109 at 117. If a jury asks for a definition of "reasonable doubt", it is difficult to respond otherwise than by explaining that it is a doubt which the jury regards as reasonable, see *Chatzidimitriou* (2000) 1 V.R. 493.

[65] Practice is not consistent on this. Sometimes judges say "are sure". On other occasions, the phrase "feel sure" is used.

[66] Chesterman, Chan and Hampton, paras 449–451

[67] See Montgomery, pp.583–585. Sealy and Cornish [1973] Crim.L.R. 208 at 218–219 reported a comparatively insignificant correlation between stringency of direction and acquittals. However in their study the most stringent of the directions used the words "feel sure and certain" which is perhaps less stringent than "satisfied so that you are sure".

[68] Montgomery, p.584.

[69] Zander (2000) 150 N.L.J. 1517.

Half of those surveyed received the words included in square brackets and the other half did not. Just over half the lay people surveyed regarded the direction (in both its iterations) as requiring 100 per cent certainty. The difference between that figure and the corresponding figure of 73.5 per cent in Professor Montgomery's survey may suggest that the formula that Professor Zander used (in both its iterations) is less stringent than the "satisfied so that you are sure" formula used by Professor Montgomery.

The New Zealand "are sure" formula may connote a higher standard than the "feel sure" formula and both, especially when accompanied by the customary brief elaboration on reasonable doubt might be thought to set a lower standard than the English standard directions. There is scope for debate as to the comparative stringency of the Australian approach.

The concept of proof beyond reasonable doubt does not require the prosecution to establish its case as a matter of absolute or scientific certainty.[70] However the "satisfied so that you are sure" or "are sure" formulations are likely to be taken by many (and perhaps most) jurors as conveying just that. So there is a gap between the message that judges try to give and the message as understood by many or most jurors.

The New Zealand approach (or approaches) created uncertainty in the minds of jurors in the cases which were studied for the New Zealand research:

> "[M]any jurors said that they, and the jury as a whole, were uncertain what "beyond reasonable doubt" meant. They generally thought in terms of percentages, and debated and disagreed with each other about the percentage certainty required for "beyond reasonable doubt", variously interpreting it as 100 per cent, 95 per cent, 75 per cent and even 50 per cent. Occasionally this produced profound misunderstandings about the standard of proof."[71]

No sensible judge would ever attempt to put a mathematical value on what constitutes proof beyond reasonable doubt, at least when summing up.[72] That said, it is alarming that jurors could act on the basis that probabilities of guilt expressed in percentage terms as low as 75 per cent or 50 per cent are enough to warrant conviction.

The reluctance of judges to make explicit the reality that the concept of proof beyond reasonable doubt is indeterminate rests on the assumption that juries cannot be trusted with the truth. Published jury research provides no substantial basis for this assumption. Indeed it is likely that juries struggle more with the uncertainties (and perhaps contradictions) which are implicit in the directions

[70] *Miller v Minister of Pensions* at 373 and *Bracewell* (1978) 68 Cr.App.R. 44.

[71] Young, Cameron and Tinsley, para.7.16. See also Chesterman, Chan and Hampton, at paras 452 and 453.

[72] McCauliff, "Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?" (1982) 35 *Vanderbilt L.R.* 1293 refers to a survey of 171 federal judges as to their views of the percentage to be applied to the phrase "beyond a reasonable doubt". At the bottom end, one chose 50 per cent, one chose 70 per cent and eight chose 75 per cent. At the top end, 21 chose 100 per cent, eight chose 99 per cent, six chose 98 per cent and one chose 96 per cent. The balance (and vast majority) chose figures between 80 per cent and 95 per cent.

which they currently receive than they would if squarely confronted with the indeterminacy which is inherent in the underlying concepts.[73]

*What judges may say when the defendant has not given evidence*

In England and Wales and New Zealand, judges are entitled to comment on the failure of a defendant to give evidence. In both jurisdictions such comments as are made must be accompanied by various qualifications.[74] In Australia what can be said by way of comment is restricted by statute in some jurisdictions and, in general, judicial comment is discouraged.[75]

The principles which determine what a judge should say to a jury about the failure of a defendant to give evidence are not exactly the same as the principles of common sense which determine whether a tribunal of fact (be it a judge or jury) is entitled to take such a failure into account in evaluating the strength of the prosecution case.[76] So if a judge makes no adverse comment on the defendant not giving evidence, this does not mean that the jury later engages in illegitimate reasoning if it takes the approach that the defendant's failure to give evidence enhances the prosecution case. This suggests that a significant reason for the imposition of restrictions on the right to comment in jury trials is the assumption that if juries were always directed in accordance with the underlying principles they would be inclined to the jump to the conclusion that a defendant who did not give evidence is necessarily guilty.[77]

What does the research indicate as to the way juries perceive defendants who do not give evidence?

This issue was addressed in the New Zealand research. By way of background, it should be noted that New Zealand judges comment less often on a defendant's failure to give evidence than judges in England and Wales do and when they do so it is usually in comparatively mild terms. In all cases, including those where adverse comment is made, New Zealand judges remind juries of the right of silence and tell them that it is not right to assume that the defendant is guilty because he or she did not give evidence. What did the jurors who were interviewed make of such directions? This what the researchers observed:

> "There were only 20 trials of the 48 in which no accused gave evidence, and there were a further two in which one accused did not give evidence but others did. Of these 22 trials, virtually all of the jurors interviewed in 14 of them maintained that both individually and collectively they attached no weight to this. The majority of these jurors also recollected the judge's instruction that

[73] This is illustrated by anecdotal accounts of jury service. Despite the stringency of directions received from English judges, some jurors are content to decide cases on a balance of probabilities basis, see Darbyshire, Maughan and Stewart, p.55. Simulated jurors in the London School of Economics Jury Project did not always draw much distinction between beyond reasonable doubt directions and a direction not to convicted unless they felt satisfied that it was more likely than not that the defendant was guilty, see Sealy and Cornish [1973] Crim.L.R. 208 at 218.

[74] See *Archbold* (2003), paras 4–398 and 4–399 for the practice in England and Wales. The New Zealand practice is described in *McRae* (1993) 10 C.R.N.Z. 61.

[75] See *Azzopardi* (2001) 205 C.L.R. 50.

[76] *Trompert v Police* [1985] 1 N.Z.L.R. 357 at 360.

[77] Other significant reasons are concern that that commenting on a failure to give evidence is inappropriately erosive of the right of silence and fear that robust comment may be unfair to defendants, see *Azzopardi* (2001) 205 C.L.R. 50.

the accused was not obliged to give evidence and that the onus was still on the Crown to prove all the ingredients of the offence. Moreover, one or two of them said that they entirely agreed with this and that it was a fair approach. A number also said that the accused benefited from the fact that they did not give evidence, since they did not incriminate themselves, and some even suggested that this was a significant factor resulting in acquittal. In these 14 trials, therefore, it seems fairly clear that the jury as a whole did make a conscious effort to apply the judge's direction, although some of them would have taken such an approach anyway.

In the other eight trials, jurors' reactions to the failure to give evidence were more mixed. In two cases, half the jurors said that it affected their individual thinking to a limited degree. However, they all denied that it had any impact on their deliberations, saying that the failure to give evidence either was not mentioned at all or was mentioned in passing but not given any weight.

In contrast, in six cases the failure to give evidence not only affected the thinking of a significant number of individual jurors but also played a part in the collective decision-making, with a number of jurors concluding that if he was not guilty he would have got on the stand and said so. In this minority of trials where the failure to give evidence did assume some importance, it appears that the judge's instructions were rarely referred to. Certainly some jurors mentioned that, in the light of the judge's direction, they tried to disregard the fact that the accused had not given evidence, but some of them acknowledged that they found it difficult to do so. Other jurors, however, made no mention of the judge's instructions at all.

Overall, therefore, it seems clear that the majority of both individual jurors and juries collectively took seriously the judge's directions that they should not use the . . . failure to give evidence at trial as proof of guilt, and most acted on that basis, at least on a conscious level."[78]

The researchers' conclusions were based on the assertions of the jurors concerned. But given the researchers' ability to cross-check such assertions with what other jurors said, there is a reasonable basis for confidence in the conclusions, at least as to whether the exercise by defendants of the right of silence was discussed in the course of deliberations. Unfortunately, there is no correlation of the responses of the jurors with the particular directions (or comments) made by the trial judge. It is possible that some of the judges had commented adversely on the fact that the defendant had not given evidence or had observed that absence of sworn evidence from the defendant contradicting or explaining prosecution evidence might be relevant to the weight to be given to that evidence or the inferences to be drawn from it.

Allowing for these limitations, it is still the case that there is nothing in the New Zealand study to suggest that juries are prone to dangerous or illogical reasoning when defendants do not give evidence. They are prepared to respect the right of silence. Even where some jurors saw a defendant's failure to give evidence as significant, there is no suggestion that it became a dominant consideration in the collective decision-making process of the jury. In short, there is no empirical evidence for any assumption that jurors are likely to reason in an unfair way in

[78] Young, Cameron and Tinsley, paras 7.37–7.40.

relation to a defendant's failure to give evidence. On the other hand, the research does indicate that some jurors are likely to be receptive to a direction broadly to the effect that a failure by a defendant to testify might be regarded as enhancing the prosecution case.

*Directions as to the circumstances in which juries may treat lies as evidence of guilt*

If the jury is satisfied that the defendant has lied on some particular issue (whether in evidence or in a statement to the police), this may be relevant to defendant's credibility. On the other hand, judges in all jurisdictions are reluctant to allow juries to treat the telling of lies by a defendant as evidence of guilt.

In England and Wales, juries are directed that they may treat lies told by the defendant as affirmative evidence of guilt only if sure that he or she did not lie for an innocent reason.[79] In Australia the law is broadly the same as in England and Wales.[80] In New Zealand, it has been held that a lie is evidence of guilt only if the telling of the lie is more consistent with guilt than innocence, for instance as suggesting that the accused cannot give an innocent explanation.[81] The way that this has been interpreted has had the practical effect that lies are virtually never advanced as direct evidence of guilt because a defendant who has lied can almost always give an innocent explanation (if only that the lie was told to avoid a false accusation of involvement in the offence). Accordingly, New Zealand judges customarily confine their directions on lies to the propositions that any lies told by the defendant are not evidence of guilt given the possibility of an innocent explanation but that such lies may be relevant to the overall assessment of the defendant's credibility (if he or she has given evidence or relies on an exculpatory statement). Judges sometimes reinforce this by saying that if the jury rejects any part of the defendant's evidence in court, it should put that evidence on one side and decide the case on the basis of the evidence it does accept.[82]

Obviously there are many situations where lies are irrelevant to questions of guilt or innocence.[83] But current judicial practice is not fully in accord with common sense or the usual rules that apply to circumstantial evidence. It is elementary that a prosecutor can advance in support of a circumstantial case factors which, when viewed isolation, are not conclusive of guilt. So where the most likely reason for a lie by a defendant is consciousness of guilt, there is no logical reason why the lie should be treated as irrelevant merely because an innocent explanation remains a reasonable possibility. This has been recognised by the courts[84] but the reluctance to allow juries to treat lies told by the defendant as direct evidence of guilt is now deeply ingrained. The reason for this reluctance is a fear of juror incompetence—a fear that in the absence of a special rule (of practice at least) there would an unacceptable risk

[79] *Burge and Pegg* [1996] 1 Cr.App.R. 163.

[80] Kirby J. is of the view that the law is the same, see *Zoneff* (2000) 200 C.L.R. 234 at 265. The leading case, *Edwards* (1993) 178 C.L.R. 193 is, however, capable of more than one interpretation.

[81] *Toia* [1982] 1 N.Z.L.R. 555.

[82] Occasionally New Zealand judges give this direction in the common situation where the only relevant lie in issue is a denial of guilt, *cf. Harron* [1996] Crim.L.R. 581.

[83] *Richens* [1993] 4 All E.R. 877 was such a case. As well, see Palmer, "Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other 'Guilty Behaviour' in the Investigation and Prosecution of Crime" (1997) 21 *Melbourne University Law Review* 95.

[84] See for instance the remarks of Brennan J. in *Edwards* (1993) 178 C.L.R. 193 at 205. This would also appear to have been recognised in *Toia* [1982] 1 N.Z.L.R. 555.

that juries would reason along the lines that the telling of a lie by a defendant necessarily implies guilt.[85]

Of the lies directions in the cases reviewed in the New Zealand study, the researchers observed:

> "[I]t can be very tentatively concluded that the instructions made little or no difference to the way in which jurors evaluated the evidence in the case. They were generally prepared to assess the credibility of witnesses, including the accused, in a pragmatic way, and where they believed that the accused was telling lies and that there was no satisfactory explanation for these lies, they not surprisingly attached considerable weight to this in reaching their verdict. It seems that the standard direction on lying was simply perceived to be counter-intuitive and was therefore disregarded. Juries did not automatically jump to the conclusion that the accused was guilty because he or she told lies to the police or in the witness box, but they found it impossible, and perhaps nonsensical, to proceed as if the evidence had not been given at all."[86]

Unfortunately, the responses of the New Zealand jurors to the lies directions given by the judges were not correlated to the detail of those directions. In many, perhaps most, cases the juries would have been told that any lies told by the defendant were relevant to the credibility of any explanation offered by the defendant. It is also possible (although unlikely) that in a few of the cases, the judges treated the lies as being potentially evidence of guilt. The overall impression conveyed, however, is that the juries took reasonable and conservative approaches to the significance they placed on lies told by defendants, albeit that this may have involved some departure from the directions of the judge. In particular, juries did not display any tendency to jump to the conclusion that the defendant was guilty merely because he or she had lied.[87] This suggests that current practice and the underlying rules about lies told by a defendant may be unnecessarily restrictive.

*Limited admissibility directions*

Jury research has focused on the ability of juries to understand, and their willingness to comply with, directions as to limited admissibility of evidence. The directions which Australian and New Zealand judges usually give in relation to lies (relevant as to credibility but not evidence of guilt) are limited admissibility directions. Limited admissibility directions are also called for

1. in respect of recent complaint evidence (relevant to consistency of the complainant's evidence and thus credibility but not evidence of guilt);
2. when the defendant has put character in issue and the jury learns of prior convictions (relevant as to credibility but not evidence of guilt); and
3. where there has been similar fact evidence (relevant for whatever purpose justified the admission of the evidence but not as to general propensity to offend).

[85] *Broadhurst* [1964] A.C. 441 at 457, *Richens* [1993] 4 All E.R. 877 at 887 and *Zoneff* (2000) 200 C.L.R. 234 at 257.

[86] Young, Cameron and Tinsley, para.7.34.

[87] The New Zealand juries took a similar approach with other witnesses who had told lies, *i.e.* they looked for explanations for why particular lies may have been told and did not tend to reject a witness's evidence in its entirety merely because of the lies, see Young, Cameron and Tinsley, para.3.22.

Research with simulated juries suggests that it makes little or no difference to trial outcomes whether limited admissibility directions as to recent complaint evidence are given or not.[88] Of far greater likely significance are limited admissibility directions in respect of lies, previous convictions and similar fact evidence.

The New Zealand research is at least consistent with the hypothesis that juries struggle with limited admissibility directions as to lies, although, for reasons already given, there are limitations associated with that research which make it difficult to draw confident conclusions.

Research in England and Wales using simulated juries suggests that jurors who are aware that the defendant has a previous conviction for an offence which is dissimilar to those for which he or she is being tried do not usually reason along the lines that such a conviction makes it more likely that the defendant is guilty, unless the prior offending was particularly reprehensible (for instance, sexual offending against children).[89] In fact, that research suggests that some jurors aware of a previous conviction for dissimilar offending are likely to rate the defendant less likely to have committed the offence than jurors who are not aware of the previous conviction. More predictably, the same research indicates that similar previous convictions are prejudicial and the more recent they are the more prejudicial their effect is likely to be.[90] Some research indicates that this effect is eliminated or significantly reduced by judicial directions to ignore completely those convictions[91] (a direction that is likely to be given where there has been accidental disclosure).

On the other hand simulated jurors have struggled to make sense of, and apply, directions that the defendant's previous conviction is relevant to credibility but does not make it more likely that he or she is guilty.[92] For instance, in one of the studies where the only variable was as to the existence and nature of the previous conviction, more simulated jurors believed the defendant with a recent dissimilar conviction than the defendant of good character.[93] In the same study, when simulated jurors were asked to assess whether their defendant was more or less likely to lie than other men of his age and background, it was only convictions for indecent assault that produced any adverse impact.[94]

Similar results have been derived from American simulated jury research. This research strongly suggests that juries treat previous convictions as relevant to propensity to offend rather than credibility but that juries are unlikely to place much weight on previous convictions for offences which neither similar to, nor as serious as that alleged against the defendant.[95]

[88] Cornish and Sealy [1973] Crim.L.R. 208 at 221.

[89] Cornish and Sealy [1973] Crim.L.R. 208 at 218, and App.D to The Law Commission's Consultation Paper No.141, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996) pp.329–330.

[90] See Cornish and Sealy [1973] Crim.L.R. 208 at 218, App.D to The Law Commission's Consultation Paper No.141, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996), p.331 and Lloyd-Bostock [2000] Crim.L.R. 734 at 737–738.

[91] See Cornish and Sealy [1973] Crim.L.R. 208 at 217–218.

[92] The literature is reviewed by Lloyd-Bostock [2000] Crim.L.R. 734 at 738.

[93] See Lloyd-Bostock [2000] Crim.L.R. 734 at 747.

[94] Lloyd-Bostock [2000] Crim.L.R. 734 at 748.

[95] Wissler and Saks (1986) 9 Law and Human Behaviour 37.

Of English jurors who were surveyed during *The Crown Court Study*, 58 per cent were of the opinion that jurors should not be told about a defendant's previous convictions.[96]

In 10 of the New Zealand trials which were studied, the jury learned both that the defendant had previous convictions and their nature.[97] In only three of these cases did any jurors acknowledge taking the convictions in account against the defendant. In five of the cases, the jurors surveyed asserted that the information had been treated as irrelevant and in the two remaining cases prosecution references to the defendant's previous record were counter-productive as they were seen by the jury as unfair or a product of prosecution desperation.[98] Unfortunately there is no correlation of the juror responses and the particular directions that were given by the judge. So it is not apparent whether jurors who were given limited admissibility directions as to the defendant's previous convictions complied with those directions or rather were only interested in illegitimate propensity reasoning associated with the convictions.

Simulated jury research as to the willingness and ability of juries to comply with directions associated with limited admissibility of similar fact evidence does not portray a clear picture. Some of the studies support the view that the giving of such directions has little or no effect on the likelihood of simulated juries convicting.[99] Other research indicates that limited admissibility directions sometimes do affect outcomes.[1] One of the problems with this research has been that simulated juries seem to be less willing than might have been supposed to use a defendant's bad character (whether evidenced by prior convictions or similar fact evidence) as basis for convicting.[2]

Limited admissibility rules are premised on two assumptions about jury behaviour: first, that in the absence of limited admissibility directions, juries are likely to reason unfairly as to the defendant's guilt; and, secondly, that juries are capable of understanding and willing to comply with such directions. The research suggests that juries are less prone to unfair reasoning than might have been expected but that compliance with limited admissibility directions is at best patchy. All of this suggests that the rules that require limited admissibility directions warrant reconsideration.

## What jury research indicates as to judicial practice

*Overview*

Jury research is relevant to the practice of judges when summing up in the following respects:

1. the timing of the summing up;
2. the language used in the summing up;
3. the medium of communication;

[96] Zander and Henderson, pp.209–210.

[97] Zander and Henderson reported that juries learnt of the defendant's previous convictions in about 20 per cent of the cases they reviewed for *The Crown Court Study*, see pp.118–120.

[98] See Young, Cameron and Tinsley, paras 6.12–6.16.

[99] See Schaefer and Hansen, pp.163–166 (where they review the literature).

[1] See Schaefer and Hansen, p.175.

[2] This and other problems with the research are discussed by Schaeffer and Hansen, pp.173–179.

4. directions as to the elements of the offence;
5. assistance with the facts.

*The timing of the summing up*

It is traditional for judges to sum up at the end of the case. However, at the start of the trial most judges make some introductory remarks to the jury. Sometimes these remarks will be of a purely housekeeping nature (perhaps as to sitting hours). But commonly they extend to a discussion of the onus and standard of proof and of the elements of the offence charged.

The New Zealand researchers observed that the jurors generally approached their evaluation of the evidence in this way:

> "[T]hey actively process the evidence as it emerges, evaluating it and attempting to fit it into an evolving story which makes sense to them. In deciding what aspects of the evidence to commit to memory or to make notes on, jurors are engaged in an interpretative process which belies the instructions that they are given at the commencement of the trial [*i.e.* to keep an open mind]. While this does not mean that jurors approach the case with closed minds or with a preconceived view of how the case is likely to develop, it does suggest that the initial frame which jurors adopt in order to construct their "story" is important. It is this frame which enables jurors to select from and interpret the evidence as it begins to emerge. Although jurors are willing to change the story as new elements are introduced, this is inevitably based on their understanding of the earlier evidence, which in turn is the result of the process of filtering and interpretation that has already taken place dictated by their earlier frame. What this suggests is that jurors' ability to absorb, make sense of, and evaluate evidence may be considerably enhanced by concerted efforts to provide them with a more coherent factual framework in the early stages of the trial and with a clear outline of the legal structure into which the facts must be fitted."[3]

This is consistent with research from other jurisdictions, which suggests a general preference by juries for story-based decision-making techniques.[4]

The New Zealand research identifies many complaints by jurors about the absence of clear guidance at the start of the trial as to the real issues in the case. In the absence of such guidance, jurors are likely to focus on what, in the end, turns out not to be in dispute and not to realise in a timely way the importance of what may be the critical evidence. The research, as a whole, shows that judges should identify before the trial commences what is in issue and then share this information with the jury at the start of the trial.[5] This is in line with the recommendation made

[3] Young, Cameron and Tinsley, para.2.57.

[4] Honess, Levi and Charman, p.771. Other relevant research is reviewed by Darbyshire, Maughan and Stewart, pp.22–23. They also review the relevant anecdotal accounts of jurors at pp.52–53. Professional judges tend to use the same approach, see Jackson and Doran, "Judge and Jury: Towards a New Division of Labour in Criminal Trials" (1997) 60 M.L.R. 759 at 763.

[5] See Darbyshire, Maughan and Stewart, pp.50–51, New South Wales Law Reform Commission, at pp.80–81 and Chesterman, Chan and Hampton, paras 446 and 447. Reference can also be made to May, "Jury Selection in the United States: Are there Lessons to be Learned?" [1998] Crim.L.R. 270.

in the *Auld Review* that at the beginning of the trial the jury should be given written material that, *inter alia*, identifies the issues that the jury will have to determine.[6]

*The language used in the summing up*

Much work has been carried out in America on the comprehensibility of jury instructions.[7] Experiments have shown that standard directions actually used by judges are misunderstood by mock jurors in alarming numbers but that improvements can be made:

> "[B]y . . . minimising sentence length and complexity, using the active voice, avoiding jargon and uncommon words and using concrete rather than abstract words."[8]

The pattern instructions that have been criticised in the American literature were couched in general or abstract terms.[9] This, in itself, causes problems and these problems are not confined to American jurisdictions. In England and Wales, Australia and New Zealand, judges customarily have access to bench books which provide standard directions.[10] Such standard directions are necessarily in broad terms and thus resemble, at least to some extent, the pattern directions that have been the subject of the American research. Occasionally they form the basis of very abstract and general directions that are not tailored to the factual issues the jury must address. The problem with this approach is well illustrated by the New Zealand research. The researchers noted that directions on inferences in the cases they studied were often given in the abstract and without reference to the evidence in the case or the inferences that the prosecution or defence were inviting the jury to draw. Such directions were generally not understood:

> "[I]t is clear that a substantial number of jurors struggled to grasp the concept and to understand its implications in the particular case. Indeed, some simply did not know what the judge was talking about, or did not know how it related to the trial at all."[11]

The practice of giving directions in general and abstract terms has been deprecated by the House of Lords and appellate courts in Australia and New Zealand[12] and this has plainly had some effect on judicial practice. So it is not

[6] The Auld *Review*, pp.521–523.

[7] By way of example, see Charrow and Charrow, "Making Legal Language Understandable; A Psycholingual Study of Jury Instructions" (1979) 00 Col.L.R. 1306 and Steele and Thornburgh, "Jury Instructions: A Persistent Failure To Communicate" (1988) 67 *North Carolina L.R.* 77 and Severance and Loftus, "Improving the Ability of Jurors To Comprehend and Apply Criminal Jury Instructions" (1982) 17 *Law and Society Review* 153. The literature is surveyed by Darbyshire, Maughan and Stewart, pp.25–27.

[8] See Steel and Thornburgh, p.87. The Canadian research evidence is to the same effect, see Law Reform Commission of Canada, pp.85–86.

[9] This is certainly true of the instructions referred to by Charrow and Charrow and Steele and Thornburgh.

[10] These are sometimes publicly available, see for instance the Specimen Directions produced by the Judicial Studies Board in the United Kingdom and the Criminal Trial Court Bench Book, prepared by the New South Wales Judicial Commission, both of which are available on the internet. In other jurisdictions bench-books are maintained on an in-house basis.

[11] Young, Cameron and Tinsley, para.7.32.

[12] *Hester* [1973] A.C. 296 at 327–328, *Alford v Magee* (1952) 85 C.L.R. 437 at 466 and *Morgan* (1990) 6 C.R.N.Z. 305 at 313.

surprising that research that is of direct relevance to England and Wales, Australia and New Zealand suggests that juries, at least collectively, usually understand the directions given to them.[13]

*The medium of communication*

In a case of any complexity it is likely that jurors will have difficulty understanding aspects of the summing up as it is delivered and even more difficulty later in recalling the detail. The same is true of evidence. It is customary for judges to sum up on the evidence and in this way to remind the jury of its salient features. But there has been much doubt as to the extent to which juries understand and recall legal directions and the relevant details of the evidence.

As indicated, the New Zealand research suggested that misunderstandings of a legal nature were common amongst individual jurors. Generally, however, these misunderstandings were corrected by other members of the jury or by further direction from the judge.

In the New Zealand cases juries also sometime struggled to recall the facts:

> "A . . . reported consequence of the fact that testimony was in oral form was that jurors had difficulty in recalling the details of it during deliberations. Such difficulties were reported to have occurred in 21 trials, and were particularly acute where the evidence was confused or contradictory, or where the sequence of events was unclear. They were also particularly likely to arise where there was more than one complainant and a number of charges: jurors reported that they got the stories between complainants mixed up; that they mistook names, dates or times; and that they sometimes had difficulty in recollecting what evidence related to which charges. The fact that jurors had significant difficulty in recalling evidence or in agreeing about what testimony had been given was reflected in the fact that they requested that evidence be read back to them in 16 trials."[14]

Resolving such difficulties can be time-consuming, distracting, and disheartening. A jury that cannot agree on what was said by the witnesses or the judge is not well positioned to reach a rational decision.

There are thus two related problems: comprehension and recall. Particular problems arise where jurors have a limited command of English or intellectual limitations. Difficulties of comprehension may also arise where the relevant subject matter is complex (for instance expert evidence or an abstruse legal principle). However, in the main, comprehension and recall problems are associated with the oral nature of the criminal trial process.

Most jurors interviewed during the New Zealand research had taken some notes during the trial.[15] However, jurors are seldom given assistance as to what aspects of the trial should be recorded by them. Many, perhaps most, jurors have no experience in taking notes. The New Zealand jurors interviewed sometimes

[13] The self-assessment surveys referred to in n.49 above and also Young, Cameron and Tinsley, paras 7.12–7.25.

[14] Young, Cameron and Tinsley, para.3.5.

[15] Young, Cameron and Tinsley, para 3.6, record that 75 per cent of the jurors interviewed had taken notes. This seems high, see for instance Darbyshire, Maughan and Stewart, p.47 and Zander and Henderson, pp.210–212. But the New Zealand jurors knew that the cases they were hearing were the subject of research. Perhaps they were on their best behaviour.

mistrusted the accuracy or completeness of the notes taken by other jurors. These concerns were not necessarily misplaced because the researchers recorded that some of the notes made by jurors were indeed inaccurate.[16]

Jurors can also seek assistance from the judge as to the detail of the evidence. Depending on the recording system which is used and local practice, the relevant evidence will be played-back or read back (if a transcript is available) or the judge might simply read his or her notes to the jury. The procedure for doing this in New Zealand is ponderous and in some of the New Zealand cases the juries, having experienced this procedure, were not prepared to make further requests to have evidence read. Instead they tried to resolve amongst themselves disagreements as to the detail of what had been said.[17]

In New Zealand criminal trials, a running written transcript of the evidence is maintained and is distributed to the judge and counsel. The mechanics of the transcript's production and distribution are obvious to jurors. Some of the jurors who were interviewed as part of the New Zealand research complained that they had not received the transcript. Where there is a transcript, it is odd that it should be provided to the judge and counsel but not to jurors, given their decision-making role.[18] As a result of the publication of the results of the research, a number of New Zealand judges have given transcripts of evidence to juries. The New Zealand of Appeal has upheld this practice.[19] Giving the jury the transcript of the evidence raises some practical problems,[20] but providing these are addressed, it can hardly do any harm. It certainly means that jurors resolve amongst themselves disputes as to what the evidence was on any particular point.

Other steps to aid juror recall and comprehension involve the judge (or counsel) giving the jury material in writing.

There is nothing new in juries being given material in writing which records the key directions of the judge and sometimes summarises aspects of the evidence. As well, counsel will often put in summaries, schedules and chronologies. In 1986 *The Fraud Trials Committee Report* recommended a much greater use of written material in fraud prosecutions.[21] Similar recommendations (but not confined to fraud trials) were made in 1993 by the Royal Commission on Criminal Justice[22] and in 2001 in Auld *Review of the Criminal Courts of England and Wales*.[23] While the use of such material is becoming increasingly common, the oral tradition of the criminal law remains strong and it is probably still only in a minority of cases that judges aid juror recall and comprehension by the use of written material.[24]

[16] Young, Cameron and Tinsley, para.3.6. The same problem occurred in the NSW trials examined by Chesterman, Chan and Hampton, paras 468 and 469.

[17] Young, Cameron and Tinsley, paras 4.19–4.21, and 4.25.

[18] Young, Cameron and Tinsley, para.3.9. Juror complaints about not having a transcript are neither new nor confined to New Zealand, see New South Wales Law Reform Commission, pp.90–92, Chesterman, Chan and Hampton, paras 462–471 and Darbyshire, Maughan and Stewart, p.49.

[19] See *McLean (Colin)* [2001] 3 N.Z.L.R. 794 at 802 and *Haines* [2002] 3 N.Z.L.R. 13 at 20.

[20] For instance, ensuring that the transcript the jury receives refers only to what happened in the presence of the jury and checking it for accuracy before the jury receive it.

[21] pp.156–160.

[22] pp.134–135

[23] pp.520–522 and pp.529–536.

[24] In the cases reviewed in the *The Crown Court Study*, judges gave written directions in only 2 per cent of cases, see Zander and Henderson, p.216.

Judges who do not put their key directions in writing (or do this only in complex cases) under-estimate the extent to which such material is appreciated by juries. In six of the 48 cases that were the subject of the New Zealand research, the judge provided the jury with a written summary of the law. In two of the cases, the jurors were provided with a flow chart and a sequential list of questions to address. For these two cases, all the jurors interviewed felt that they were assisted by the flow chart. The researchers recorded that 62 per cent of the jurors who did not receive such material said that they would have found it helpful if it had been provided.[25]

*Directions as to the elements of the offence*

Many individual jurors have difficulty following and recalling the judge's directions on the law.[26] In 35 out of the 48 New Zealand cases which were studied "fairly fundamental misunderstandings of the law" emerged during deliberations and in 19 cases, one or more jurors misunderstood significant aspects relating to the ingredients of the offence.[27] The researchers' conclusions on this were:

> "Since misunderstandings about the law were fairly widespread, they did affect the way in which individual jurors, and sometimes the jury as a whole, approached the decision-making task; they undoubtedly prolonged deliberations and they sometimes led individual jurors to agree to a verdict on an erroneous basis. However, by and large, errors were addressed by the collective deliberations of the jury and did not influence the verdict of the majority of cases. Our assessment is that legal errors resulted in either hung juries or questionable verdicts in only four of the 48 trials, and in two of these, the questionable verdicts were acquittals in respect of only a proportion of a large number of counts."[28]

As already indicated, juror comprehension is likely to be limited unless the judge speaks to the jury by reference to the facts of the case at hand. A judge who takes this approach to its logical conclusion will sum up in the way recommended by Professor Edward Griew:

> "It should be the function of the judge to protect the jury from the law rather than to direct them on it. The judge does in practice typically tell the jury that the law is for him and facts are for them. This should become more profoundly true than it now is. A brief statement of the law will be unavoidable if the case is to be intelligible. But what is said should not be by way of formal instruction. When it comes to instructing the jury on their task, the job of the judge should be to filter out the law. He should simply identify for the jury the facts which, if found by them, will render the defendant guilty according to the law of the offence charged and of any available defence."[29]

[25] Young, Cameron and Tinsley, para.7.60. The New South Wales Law Reform Commission reported that nearly one-half the jurors they surveyed would have appreciated a written copy of all or part of the judge's summing up, see p.92.

[26] See for instance the anecdotal accounts referred to by Darbyshire, Maughan and Stewart, p.49.

[27] Young, Cameron and Tinsley, para.7.13.

[28] Young, Cameron and Tinsley, para.7.25.

[29] Griew, "Summing Up.the Law" [1989] Crim.L.R. 768 at 779.

The results of the New Zealand research, when read in their entirety, show that this approach does indeed represent best practice.[30] So, when explaining the elements of the charge to the jury, a judge should use concrete and not abstract language and should, in particular, identify, with respect to the defendant and what is alleged by the prosecution, specific questions which the jury must answer in favour of the prosecution before it can convict.[31] Further, even in a comparatively simple case, it is helpful for jurors if the key directions as to the elements of the offence are put in writing. Obviously in complex and nuanced cases the need for written directions is most obvious.[32]

*Assistance with the facts*

Whether and the extent to which judges should sum up on the facts is open to fair debate.[33] Some of the literature indicates that jurors attach comparatively little importance to what the judge says as to the facts and some jurors claim when interviewed that what was said was boring or repetitious.[34] As well, and in response to the problems that so often arise on appeal, the view is sometimes expressed that the less judges comment on the facts the better.[35] It is difficult to be confident about the extent to which juries are affected by what they regard as the judge's view of the merits.[36] What is very clear in practice is the resentment which convicted defendants and their supporters feel when the judge is seen to have summed up hard for a conviction.

In England and Wales and Australia judges refer to the evidence when summing up in what is often considerable detail. When done badly, this involves little more than the judge reading his or her notes of the evidence and adding a running commentary.[37] When done well, the summing up is along the lines described by Lord Devlin in *Trial by Jury* (1966):

> "All the material which gets into the ring that is kept by the rules of evidence is not of course of equal value, and the task of counsel and then of the judge is to select and arrange. In discharging this task counsel can be helpful but not disinterested and the jury must look chiefly to the judge for direction on the facts as well as the law. It is his duty to remind them of the evidence, marshall the facts and provide them, so to speak with the agenda for their discussions. By this process there emerges at the end of the case one or more broad questions—jury questions—which have to be decided in the light of common sense."[38]

[30] Young, Cameron and Tinsley, paras 5.5, 6.7, 7.37 and 7.61.

[31] This is in accordance with the recommendations made in the Auld *Review*, pp.534–536.

[32] A very good example of fact specific written issues in a complex murder trial is discussed by Arlidge, "The Trial of Dr David Moor" [2000] Crim.L.R. 31 at 39.

[33] See for instance Wolchover, "Should Judges Sum-up on the Facts?" [1989] Crim.L.R. 781.

[34] Darbyshire, Maughan and Stewart, p.48 and Young, Cameron and Tinsley, para.7.26.

[35] *Azzopardi* (2001) 205 C.L.R. 50 at 70 and *RPS* (2000) 199 C.L.R. 620 at 637.

[36] See Young, Cameron and Tinsley, paras 7.26–7.29 and Zander and Henderson, pp.216–219 and McCabe and Purves, *The Shadow Jury At Work*, pp.33–34.

[37] Very much in the style lampooned by Dickens in his description of the judge's summing up in *Bardell v Pickwick* in *Pickwick Papers*.

[38] pp.115–116.

There are some problems with this approach. In a short case, there is comparatively little need to remind the jury of the evidence. In a long case, where there may well be such a need, it is doubtful whether a lengthy oral summing up (taking hours or days to deliver) will adequately answer that need. On the other hand, the limited empirical evidence points to juries generally regarding a summing up on the facts as of assistance particularly in longer cases.[39]

New Zealand judges usually sum up on the facts briefly and sometimes do no more than summarise the key prosecution and defence contentions (perhaps by paraphrasing the closing addresses of counsel). This style of summing up has some advantages: it is succinct; it is balanced; and the judge almost inevitably puts the defence case adequately. However given the problems encountered by some New Zealand jurors in the cases which were studied, it is open to question whether this short-form style of summing up is sufficient to bring the issues and associated evidence clearly to the attention of jury:

> "Jurors routinely encountered problems in assessing evidence in multiple charge trials. In particular, they found it difficult to identify what evidence related to which charges. This problem arose in at least 11 trials involving multiple counts. Although this may have been in part attributable to the personal limitations of individual jurors, and their inability to analyse and differentiate complex information about a range of similar events, it was at least as much a consequence of the way in which the case was conducted: too many charges were brought; insufficient effort was made to distinguish the various charges for the jury; or the presentation of the evidence did not link it explicitly enough to the charge to which it related.[40]
>
> . . .
>
> Jurors rarely mentioned the judge's summary of the evidence. Two specifically said that it repeated what they had heard already and was unnecessary, and a few others suggested that it was boring and they did not listen to it. For the most part, when jurors were questioned about the judge's summing-up, they focused on the directions on the law. Equally, when they indicated how the jury had taken the judge's directions into account during deliberations, they referred to the law and the standard directions but did not mention the evidence. While it is not possible to conclude with confidence that juries were unaffected by the content of the judge's summing-up on the facts, this does nevertheless suggest that the judge's comments in this respect are of only minor importance and that juries are unlikely to be affected by nuances or minor omissions in those comments."[41]

Although the criticisms in the first of the passages cited were directed at counsel, it is a judicial function to ensure that the issues in the case are before the jury and that the evidence associated with those issues is identified. Overall, the New Zealand research suggests that problems with juror understanding could have been reduced if the juries had received more judicial assistance with the facts, for instance, by the judge clearly identifying the issues the jury had to address and identifying the evidence which was relevant to each issue. The New Zealand juries

[39] See Zander and Henderson, p.214.
[40] Young, Cameron and Tinsley, para.3.13.
[41] Young, Cameron and Tinsley, para.7.26.

that were studied deliberated most efficiently (both in terms of process and result) when they adopted a systematic structure for assessing the evidence and applying the law. The adoption of such a systematic structure was facilitated when the judge's summing up provided what was, in effect, an agenda for jury deliberations.[42] A summing up along the lines recommended by Professor Griew (as to the law) and Lord Devlin (as to the facts) should provide just such an agenda.

However the judge sums up on the facts, there remain problems of jury recall particularly in cases which last more than a few days. Common sense suggests that in such cases, juries will be assisted by written material to remind them of the most relevant features of the evidence.

## Conclusions

Jury research reinforces the necessity to evaluate the way in which judges sum up in light of a practical recognition of the strengths and weaknesses of juries.

In some respects, the courts have under-estimated the strengths of the jury system. Isolated instances of jury misconduct or perversity should not be taken as the norm. It is right to recognise that juries are generally diligent, and, if given the right assistance, are usually collectively willing and able to determine cases on the evidence and in accordance with the law as laid down by the judge. While probably sometimes unable or unwilling to comply with limited admissibility directions, juries appear to take a more conservative approach than has usually been feared to issues such as previous convictions on the part of defendants, defendants not giving evidence and lies told by defendants.

If some of the rules which have developed around the way judges sum up are under-pinned by unnecessarily gloomy views of juror competence, many practical aspects of the criminal trial process rest on unrealistically high assessments of juries' powers of analysis, comprehension and recall. Jurors are unlikely to have had experience in breaking down complex factual controversies into issues of manageable size. If there are a number of such issues, they will struggle to match these issues to the relevant evidence. Limits to their collective powers of comprehension and recall will be most apparent in lengthy or complex cases. All of this requires inputs from the judge. This should be in language that is appropriate to the occasion—simple concrete language firmly tied to the facts of the case at hand. At the start of the trial, jurors should be told what is truly in issue. In the summing up, if not before, the judge should marshal the evidence around those questions. In cases any length, the oral process of the criminal trial process requires some written supplementation if jurors are to recall enough of the evidence and the summing up to be able to deliberate efficiently and to reach verdicts on the evidence and in accordance with the law.

[42] Young, Cameron and Tinsley, para.6.7.