Jurors' knowledge, county court crisis, coroners' powers, and human rights cases

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The knowledge of jurors

In ancient times, trials were often by ordeal. Such trials were governed by principles of the early Christian Church. Trial by ordeal of water, for example, meant trussing up a person and lowering him or her into a pond. If they sank, the water "received" them so they were judged innocent and pulled out before they drowned - a 'court procedure' which, when it went wrong, was not something easily correctable on appeal. In trial by hot iron, a party was compelled to hold a rod of extremely hot iron. The burnt hand was then sealed up with a cover to prevent the injured person from treating the wound. After a few days, the wound was inspected by the tribunal. If it had healed with no blister, it was taken that God had found the person innocent. In those days, a career in trial work, therefore, entailed less legal study than today.

In 1215, the Lateran Council (of the Western Catholic Church) banned trial by ordeal, and thereafter use of the jury as a means of evaluating a case began to become popular. In the early days of the jury, jurors were selected precisely because they were local to the events in question and were relied on for their knowledge of the people, place and events in question. They were asked to give their version of the truth, their *verdictum*. In modern times, by contrast, as different notions of justice have developed, jurors are selected on the basis that they know nothing about the case in question, or the people in it. The best evaluation of truth is now seen as coming from people not likely to be biased from any existing knowledge of the people or events in the case.

One principle that the courts use to enforce this part of the system is that jurors must, after the trial, when they have retired to consider the evidence, consider only the evidence brought into the court case. They are not allowed in the jury room to use new evidence that has not been subject to the cut and thrust of questioning and cross-questioning in the court. If juries were allowed to do that (to discuss evidence that some of them had privately acquired about the case) it would be very unfair because they would be relying on evidence that had not been exposed to critical scrutiny and questioning by advocates in court – evidence that might have rapidly crumpled in credibility under the skilled inquiry of advocates and the judge.

The extent to which jurors are allowed to use evidence they have collected on their own is discussed in a recent Court of Appeal case. The answer in brief is this. They are not allowed to get or to discuss privately acquired evidence, and if they do so their verdict will be unsafe and quashed. In this case, though, the extra information that the jurors got from the internet was minimal and not evidence about the case itself (just data about matters like sentencing) so the guilty verdicts they had returned were safe.

R v Jay David Marshall: R v Robert John Crump [2007] EWCA Crim 35

Facts

The two defendants had been convicted at the Central Criminal Court of various offences including robbery, possession of a firearm with intent to endanger life, and manslaughter. In one incident a man at Marshall's flat in London had been tied with cable, robbed of jewellery, and shot. After the jury had returned their verdicts and the trial had concluded, printed material was found in the jury room. The papers were printed sheets from websites including those of the Crown Prosecution Service, a criminal solicitors' practice, and the Home Office. It seemed that the jury had wanted to know about what sentences would be likely to follow from various types of conviction. Marshall and Crump submitted that it was clear that the jury had conducted their own research and that the content of the material found suggested that the jury might have taken extraneous matters into account during their deliberations.

Held

On the face of it, the printed material was an irregularity that could render a conviction unsafe (the case of *R v Karakaya (Adem)* (2005) EWCA Crim 346, was considered). It was impossible to know how many jurors had been shown the additional material and it might have been one juror or all of them, but it was plain that at least one had viewed it. By referring to that material the jury *had* contravened the important principle that no further material should be considered once they had retired to consider their verdicts. Furthermore, what at least one juror, and possibly more, had seen was material the defendants did not know about and concerning which they were unable, therefore, to address in argument.

There was no doubt that the information was largely available in the public domain and was information to which any person had legitimate access. The problem, though, could not necessarily be solved by virtue of the material being in the public domain because, had the judge known about its existence, he would have been able to provide an appropriate direction requiring the jury to concentrate on the evidence in the case.

The issue for the court was whether or not, in the overall context of the case, the additional material was sufficient to render Marshall's and Crump's convictions unsafe. In the earlier case of *R v Karakaya*, a rape case, it had been expressly left open by the Court of Appeal whether every breach by a jury inevitably rendered a conviction unsafe. The material in that case was of a campaigning nature. It had also been downloaded from the internet, and found by a bailiff in the jury room after the trial. It was such as to have been able to be used to influence the guilty/not guilty choice to be made. One document was called "The feminist position on rape", and another, from Colchester Rape Crisis Line, "Rape and the Criminal Justice System". The documents were tendentious and inaccurate. There was a possibility that the material had influenced the decisions of a jury,

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so the subsequent convictions were considered unsafe. The conviction in the case was quashed and a new trial was ordered.

In the later case, by contrast, there were several factors that led to the conclusion that both Marshall's and Crump's convictions *were* safe. First, the material found in the jury room had merely considered the range of tariffs available at sentencing. The jury asked specific questions of the judge and had used him as the only authority on matters of law. Second, it may have been possible to influence the jury as to alternative offences and the tariffs that accompanied them but both defendants were *acquitted* of murder, so it was difficult to see how the jurors' knowledge of sentences could have damaged the verdicts of guilty. If there had been evidence that a defendant was convicted of the *more* serious of two offences (e.g. murder as opposed to manslaughter), and that the jury might have opted for that having considered the possible sentence for the lesser offence was unsatisfactory (so the jury was acting as a sort of sentencer) that would be wrong, but that was not the case here. Third, the jury made several other requests for clarification on points of law to the judge, demonstrating that they were turning to him for guidance as they should have. There had been no scenario demonstrating that Marshall and Crump were adversely affected by the content of the additional material. Their appeals against their convictions were dismissed.

Comment

This is a good example of the way that the common law (here through the judgments of court of appeal judges) can adapt old principles to new developments. In order to try a case fairly, the jury must evaluate only evidence which has been given in the court, and which all parties have had the chance to test and criticise in that open forum. Jurors must not discuss the case with other people because to do so might let slip into their considerations some points that no-one else will have had a chance to challenge. Most people in the UK now use the internet. The use of the internet by people to help with all sorts of things might therefore extend to jurors faced with the challenge of deciding a case, and so the rule against private research must be extended to cover the new phenomenon. This case makes it clear that the safest thing is for jurors to avoid any personal research about the case they have to decide.

County Court Crisis

The county courts are the main platform on which the civil rights of British citizens are played out. If something goes badly wrong on this platform, as the evidence suggests is happening now, then the rights of British citizens are prejudiced on a significant scale.

There are 218 county courts in England and Wales, dealing with claims for matters such as personal injury, debt, house repossessions and breaches of contract. All but the most complicated and momentous civil cases are dealt with by the county courts.

In February, 2006, Judge Paul Collins, London's most senior county court judge, told BBC Radio 4's *Law in Action* programme that low pay and high turnover amongst administrative staff mean that serious errors are commonplace and routinely lead to incorrect judgments in court. Judge Collis said:

> "We are operating on the margins of effectiveness and with further cuts looming we run the risk of bringing about a real collapse in the service we're able to give to people using the courts."

According to Judge Collins, the lack of resources is causing mistakes. A common problem is one in which someone who is being sued files a defence but the papers are not passed on to the judge by overburdened court staff. The judge will automatically award damages to the person who brought the claim, assuming that the person being sued does not want to defend it. According to Judge Collins,

> "This happens on a regular basis and although these errors can be put right it takes work to put them right, producing more to do for already hard pressed court staff and judges."

Staff in the court service are amongst the poorest paid of all government departments. In Judge Collins' own court in Central London, the number of people employed has been cut from 125 in 1992 to just 80 today. The quantity of work, however, has not diminished. Roughly speaking, therefore, the remaining staff are having to cover between them about a third more work than when there were 125 staff. That would be like, supposing you worked in a 9.00 – 5.00 job, being told your new working day would now last until 7.30pm, or that you could still go home at 5.00pm provided you worked so hard that you managed to fit the extra two and a half hours worth of work in before 5.00pm! It is no wonder that country court staff are becoming stressed and losing files.

County courts are no longer subsidised through general taxation. Instead, they are expected to generate all their income from fees charged to court users. This was intended to protect the courts from having to compete with other public services for government funds. The courts' budgets are fixed by government, and although the courts more than covered their costs last year, the surplus raised from fees was spent on other services.

Problems in the administration of the courts have, in Judge Collins' experience, been further exacerbated by cuts in the availability of legal aid. He stated that:

> "There is plenty of anecdotal evidence that this has led to an increase in the number of people representing themselves without the help of a qualified lawyer. These cases inevitably take up more time and as a result court proceedings last longer to the detriment of others using the courts."

Coroners' powers to help prevent future deaths

In January 2007, Andrew Walker, Oxfordshire Assistant Deputy Coroner, said he would play in court the United States Airforce warplane cockpit video relevant to the "friendly fire" death of Lance Corporal of Horse, Matty Hull, who was killed in Iraq. The recording is now in the public domain. The coroner acted with courage and independence in standing up to official stances which would have impeded the discovery of the truth. For many weeks there was a governmental denial that the tape even existed. In this perseverance, Mr Walker acted in the tradition of those whose coronial role is the pursuit of truth on behalf of the people.

Coroners were originally appointed as *custos placitorum coronae*, keepers of the pleas of the Crown. They had responsibility for criminal cases in which the Crown had an interest, particularly a financial interest. By development of their role, however, and particularly through the pioneering work of the nineteenth-century coroner Dr Thomas Wakley, the coroner became, in Wakley's phrase, "the people's judge".

The coroner is the ultimate public safeguard in an area of unmatched importance: the official documenting of how people die (see Slapper & Kelly, *The English Legal System*, 8th edition, Routledge-Cavendish, chapter 4). It was Dr Wakley who originally campaigned for all suspicious deaths, deaths in police custody or prison, and deaths attributable to neglect, to be brought within the jurisdiction of the coroner. He was an energetic reformer who was also an MP and founder of the medical journal *The Lancet*.

The main function of the modern coroner is to determine certain facts about deaths, especially if they appear to have been unnatural, sudden or where the cause is unknown.

The classifying of types of death is clearly of critical importance, not just to the state, politicians and policy makers,

but also to the sort of campaign groups that exist in a constitutional democracy to monitor suicides, drug-related deaths, deaths in police custody and prison, accidental deaths, deaths in hospitals, and through industrial diseases. Having a reliable system for charting who is dying, and in what circumstances, is of considerable social value. It is important for us to know, for example, that there were 3,200 suicides in England and Wales in 2005, as this should inform public policy related to the health service, community services, custodial policy, and the emergency services.

In the English legal system, the coroner's court is unique in using an inquisitorial process. There are no 'sides' in an inquest. There may be representation for people like the relatives of the deceased, insurance companies, prison officers, car drivers, companies (whose policies are possibly implicated in the death), and train drivers, etc, but all the witnesses are the coroner's witnesses.

The court is forbidden to make any wider comment on the death and must not, according to the law, determine or appear to determine criminal liability 'on the part of a named person'. Nevertheless, the jury may still now properly decide that a death was unlawful (i.e. a crime). The verdict 'unlawful killing' is on a list of options (including 'suicide', 'accidental death', and 'open verdict') made under legislation and approved by the Home Office.

If governmental legislative plans are implemented, coroners will be given stronger powers to respond to the wish of bereaved relatives to ensure that lessons are learned from a sudden death, helping to prevent the same thing from happening in the future.

Coroners can already make reports to public or private sector organisations about what preventative actions could help avoid repeat incidents. New powers to be included in the draft Coroners Bill 2007 will build on the existing law in four ways:

- Coroners will be able to require organisations to respond to their reports and to say what action they will take to prevent future deaths;
- The coroner will be able to request a written response to his or her report within a specified time and there will be a legal obligation for agencies and organisations to respond.
- The Chief Coroner, to be appointed under the Bill, will monitor the reports made and responses received; and
- An annual report of these responses will be made to the Lord Chancellor and laid before the House of Commons, to ensure accountability.

A similar system has been successful in Australia where the State Coroner in Victoria believes it has saved lives and claims that recommendations have led to legislative and policy changes in cases involving pedestrian safety in the workplace, tractor roll-overs, drowning of children in swimming pools, accidental child hangings from blind and curtain cords and prison cell design.

Decline in the use of human rights arguments

The UK courts have seen an 18 per cent decline in the number of reported cases using Human Rights Act (HRA) arguments from 479 in 2004-5, to 394 in 2005-6 (Lawtel & Westlaw). Only 140 cases used HRA arguments in 1999, prior to the introduction of the legislation, but this increased by 248% the following year. The number of cases employing human rights arguments peaked during 2002-2003, with 541 cases making use of the Act. Over the past three years there has, however, been a gradual decline.

The fact that the use of human rights arguments in cases is in decline does not indicate any defect in the legislation. The worth of a law cannot be judged by how many times it is actually used in the courts. A sensible law whose provisions society knows and understands is less likely to be quarrelled about in law courts than is a silly or contentious law. Stephen Grosz, head of public law and human rights at Bindman & Partners, has observed of the HRA that:

> "Everyone is now aware of the legislation and organisations have become more careful about complying with human rights obligations, so the HRA has been successful on this account. On the other hand it certainly hasn't opened the floodgates to litigation as some doom mongers warned."

Despite a fall in the number of cases in which advocates rely on the HRA, the application of human rights arguments in court is still prevalent, and the Act is being applied to a broader spectrum of legal cases such as property and employment law - a trend which is continuing to gather pace. There is also now a higher proportion of human rights cases reaching the Court of Appeal and the House of Lords than there was five years ago. Mr Grosz has noted that:

> "The Human Rights Act is becoming central to more and more of the really important legal decisions that are being made in the UK. It has managed to keep a check on some of the government's more authoritarian instincts which in the post 9/11 world has been a considerable achievement."

The phenomenon that there are fewer cases in this area of law while the impact of the law is growing because citizens are more mindful to behave in a lawful manner, has a counterpart in the fall of civil litigation. Despite a growth in news stories "compensation culture" there are fewer cases being brought in the courts year after year in recent times. This fall is consistent with companies, organisations, and citizens being more cautious than they used to be about the threats of legal action, and so being more careful to become legally compliant.

The legislative output of Parliament is now running at over 2,000 pages of new law a year. Yet we have a relatively low ration of lawyers per citizen. One argument against a society with lots of lawyers is that it breeds an infectious and baleful 'compensation culture'. Contrary, however, to fears of a tornado of law suits when 'no win, no fee' arrangements, the new civil procedure rules, and accident claim firms were first introduced in the late 1990s, there has not been an explosion of litigation.

There has, contrariwise, been a fall. We are not obsessively suing one another into oblivion. According to *Judicial Statistics*, published by the Department for Constitutional Affairs, 153,624 writs and originating summonses were issued in 1995 in the Queen's Bench Division of the High Court. By 2002, the number had fallen to just 18,624. By 2005, the figure was 15, 317. This is the court that deals with all substantial claims in personal injury, breach of contract, negligence actions and other civil matters. The number of claims issued in the county courts has also fallen significantly in recent times. In 1998, the number of claims issued nationally was 2, 245,324 but by 2005 the number of annual claims had fallen to 1,870,374.

The general drop in cases going through court probably means that more cases are being settled out of court. There has not been any precipitous fall in client-solicitor consultations, nor has there been a fall in consultations at the Citizens Advice, so people are evidently taking legal advice as before but then litigating many fewer cases all the way to the courts. That is generally a good thing because rights are legally vindicated in a relatively efficient way.