JURY ADAPTATIONS TO THE INTERNET AGE AND THE AGE-LIMIT, HUMAN RIGHTS AND THE LEGAL SYSTEM, CHANGES TO THE NO-WIN NO-FEE SYSTEM

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Jury adaptations - the internet age and the jury age limit

It is sometimes said, rather cynically, that a jury consists of 12 people chosen to decide which side has the better lawyer.

In reality, the jury is a very democratic institution which ensures that when the state prosecutes a citizen, it is not also the state which decides whether the citizen should be convicted.

The modern jury has evolved across many centuries and the reason for its success today is precisely that it has changed dramatically in order to fit in with changing conditions. It used to be, for example, that jurors were chosen because they knew the people and events in question whereas today they are selected precisely because they do not know the people and events involved in a trial. It used to be that only male property owners were eligible for jury service whereas now it is anyone on the electoral register between 18 and 70.

Two recent developments show how the evolution of a legal institution works: one where a change is being made because it suits the social environment and one where a suggested change is not being made because it would not work well in the social environment.

The first concerns a ruling that judges should now give an explicit order to jurors in all trials instructing them not use the internet to research the case they are on because such conduct can pervert justice. The second concerns a judges' report arguing that (despite the improved health of older people over recent generations) citizens over 70 should not serve on juries.

Background

Recent evidence suggests that juries are generally fair and balanced in their decision-making. In 2010, a major empirical study found that juries virtually always act in a fair way. The research was conducted by Professor Cheryl Thomas at University College London. Are Juries Fair? is the most in-depth study into the issue ever undertaken in the UK.

http://www.justice.gov.uk/publications/are-juries-fair.htm

The study involved a two-year survey of more than 1,000 jurors at Crown Courts and a separate study of over 68,000 jury verdicts. In the report, sensitive issues about jury decision-making were examined for the first time.

The research finds that:

- all-white juries do not discriminate against defendants from black and minority ethnic backgrounds
- juries almost always reach a verdict and convict two-thirds of the time
- there are no courts where juries acquit more often than convict
- jurors want more information about how to do their job
- written instructions improve jurors' legal understanding of cases
- some jurors use the internet to look for information about their case
- some jurors find media reports of their case difficult to ignore.

The study recommends that all sworn jurors be issued with written guidelines explaining what improper conduct is, including use of the internet, and how and when to report it. The study also recommends that judges consider issuing jurors with written instructions on the law to be applied in each case.

The internet

In *R v Benjamin Thompson* [2010] EWCA Crim 1623, the Court of Appeal held that juries must be explicitly forbidden from using the internet to help them decide a case. The ruling was part of a case concerning six appeals in which there had been allegations of jury irregularities.

The normal rule is that what goes on in a jury room is sacrosanct and cannot be investigated. It is by that rule that the power of the ordinary people is preserved and protected. There are however exceptions. One is where there is some evidence that a jury has broken its oath to decide the case according to the evidence and has reached a verdict "by the casting of lots or the toss of a coin, or the well-known case of the use, or rather misuse, of an Ouija board" (para 4). Such a verdict can be quashed.

Another exception arises in cases where extraneous material has been introduced into the jury deliberations. The verdict must be reached, according to the jury oath, in accordance with the evidence. If a juror goes home and secretly downloads material from the internet which he thinks will help with the case (e.g. road maps, or scientific evidence, or something about the defendant's past character) and then uses it to come to his decision, the other side of the case will have had no opportunity to try to refute that evidence in open court. The secret evidence will remain untested.

Lord Chief Justice Judge said that each juror brings to the decision-making process, his or her own experience of life and general knowledge of the way things work in the real world; that is part of the stock in trade of the jury process, and "the combination of the experience of a randomly selected group of twelve individuals, exercising their civic responsibility as a collective body, provides an essential strength of the system". However, the introduction of extraneous material, that is non-evidential material, constitutes an irregularity. Examples from cases include telephone calls into or out of the jury room, papers mistakenly included in the jury bundle, discussions between jurors and relatives or friends about the case, and in recent years, information derived by one or more jurors from the internet. Where the complaint is made that the jury has considered non-evidential material, the court is entitled to examine the evidence to ascertain the facts. If extraneous material has been introduced into the decision making process, the conviction may be quashed.

The Lord Chief Justice recognised (para 11) that "the use of the internet has expanded rapidly in recent years and it is to be expected that many, perhaps most, jurors, will be experienced in its use and will make habitual

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reference to it in daily life"

He went on to say that the approach of the court will be to make inquiries into material garnered from the internet and if, on examination, it strikes at the fairness of the trial, because "the jury has considered material adverse to the defendant with which he has had no or no proper opportunity to deal" then the conviction is likely to be unsafe.

The Court held (para 12) that as the internet is so common some specific guidance must now be given to jurors. It stated that:

> Jurors need to understand that although the internet is part of their daily lives, the case must not be researched there, or discussed there (for example, on social networking sites), any more than it can be researched with, or discussed amongst friends or family, and for the same reason. The reason is easy for jurors to understand. Research of this kind may affect their decision, whether consciously or unconsciously, yet at the same time, neither side at trial will know what consideration might be entering into their deliberations and will therefore not be able to address arguments about it.

This would represent a departure from the basic principle which requires that the defendant is tried only on the evidence admitted and heard by them in court.

The Court of Appeal did not purport to lay down a standard form of words for the judge to use when warning the jury. What matters, it ruled, is that it should be explicitly related to the use of the internet. It recommended:

> a direction in which the principle is explained not in terms which imply that the judge is making a polite request, but that he is giving an order necessary for the fair conduct of the trial.

The age limit

On the issue of at what age people should no longer be able to serve on a jury, criminal trial judges declared themselves against a proposal to allow people over 70 to sit as jurors. In *The Upper Age Limit for Jury Service – Observations of the Criminal Sub-Committee of the Council of HM Circuit Judges* (10th May, 2010) the judges noted that such a 'fit to judge things in a law court' rule for jurors would entail that judges would also have to be allowed to preside in cases into their seventies and that would not be desirable.

The Council of HM Circuit Judges, which represents more than 600 judges in England and Wales, points out that judges, magistrates and tribunal members all retire at 70. They say that the public might be concerned if judges who were considered to have reached compulsory retirement age at 70 could still perform a similar service as jurors.

The judges noted (para 5) that magistrates are the "jurors" in their courts. "Are they to be compulsorily retired from that function but then required to perform a very similar function on jury service?"

The Council of Circuit Judges argues that there are already about 30 million people eligible to sit as jurors. With 446,703 juror summonses issued each year, and 319,073 people actually required to sit, the council says that the size of the jury pool "is more than adequate".

The Council rejects the idea that there will be significant cost savings by using post-retirement citizens who do not need financial recompense for missing work days: "That takes no account of the fact that older people are more susceptible to illness and disability than those who are younger" (para 4). The report suggests "It is clear that the risks of non-availability or unintended disruption to proceedings would increase." The report notes that although many people over 70 play an active part in their community, there are "many who do not enjoy the best of health, for whom jury service after the age of 70 would be a substantial burden".

Human rights and the legal system

Lord Diplock once noted that it is "inherent in the English legal system" that when social conditions change legal development "should at first be piecemeal" T*he Johanna Oldendorff; E L Oldendorff & Co GmbH v Tradax Export SA* [1973] 3 All ER 148 at 173.

That is certainly true of the piecemeal and graduated way that human rights have been incorporated into English law as a result of changing social and political opinion. In some ways human rights have been admitted into the English legal system very gradually over history (to begin with not under the name 'human rights') since the thirteenth-century.

The UK first signed up explicitly to nominate 'human rights' as part of the United Nations' Universal Declaration of Human Rights in 1948. The UK then signed the European Convention on Human Rights in 1951, built then into domestic law in 1998, and has been elaborating on those rights over the last decade.

The story is one of constant development. Speaking at a Human Rights Day event on 10th December, 1961, the English lawyer Peter Benenson, the founder of Amnesty International, said that it is:

> better to light a candle than curse the darkness

What he ignited has since conflagrated across the world. Amnesty now has over two million members and over 100 offices worldwide.

The development of human rights is a long and complex story whose longest roots can be traced to a variety of sources including, arguably, Hammurabi's Code in Babylon around 1780 BC. More modern developments can be found in the Magna Carta of 1215, the Bill of Rights in 1689, and Thomas Paine's Rights of Man in 1791. The story of the development of human rights is, like science, music and literature, a story of continuing organic development: it cannot be terminated. Whatever its detractors think, the human rights project will not cease abruptly if a particular piece of legislation or a code is repealed.

The story is not, though, always a story of advancement. A judicial decision can arrest the development of law. In holding that the Human Rights Act 1998 does not apply to armed forces on foreign soil, the Supreme Court has recently recoiled from an important opportunity to underline the full significance of human rights: *R (on the application of Smith) (Respondent) v The Secretary of State for Defence and another (Appellants)* [2010] UKSC 29, [2010] All ER (D) 261 (Jun) from which I take the facts directly.

To accord human rights to UK soldiers on foreign soil would not entail anything preposterous such as keeping them out of harm's way or having health and safety inspectors on the battlefield. Soldiers, after all, consent occupationally to be exposed to mortal danger. Giving soldiers human rights would, though, prevent them being exposed to wanton and unnecessary lethal danger by, for example, unpardonably reckless decisions of senior officers.

The Supreme Court case arose in this way. Private Jason Smith, a member of the Territorial Army since 1992, was mobilised for service in Iraq in June 2003. After acclimatising for a short period in Kuwait he was sent to a base in Iraq, from where he was billeted in an old athletics stadium. By August, the daytime temperature in the shade exceeded 50 degrees centigrade. On 9 August he reported sick, complaining of the heat. Over the following few days he was employed in various duties off the base. On the evening of 13 August he collapsed at the stadium and died of heat stroke.

An inquest found that Private Smith's death was caused by a serious failure to address the difficulty he had in adjusting to the climate. Private Smith's mother commenced proceedings to quash that verdict and to ask for a new inquest to be held. She argued that the United Kingdom had owed her son a duty to respect his right to life which was protected by article 2 of the European Convention on Human Rights (ECHR) and that the inquest had to satisfy the procedural requirements of an investigation into an alleged breach of that right.

The High Court held that Private Smith had been protected by the Human Rights Act 1998 at all times in Iraq and ordered a fresh inquest. Mr Justice Collins gave a helpful example ([2008] EWHC 694 (Admin) Case No: CO/4633/2007, para 20) when suggesting that human rights did have some application even in battle:

> "...the soldier does not lose all protection simply because he is in hostile territory carrying out dangerous operations. Thus, for example, to send a soldier out on patrol or, indeed, into battle with defective equipment

> could constitute a breach of Article 2. If I may take a historical illustration, the failures of the commissariat and the failures to provide any adequate medical attention in the Crimean War would whereas the Charge of the Light Brigade would not be regarded as a possible breach of Article 2."

On appeal, before the Court of Appeal, the Secretary of State agreed he would not submit to the new coroner that the requirements of article 2 were inapplicable. Despite that concession, the case went to the Supreme Court as it raised issues of general importance and of practical concern.

Article 1 of the ECHR says that all signatory states must secure human rights "to everyone within their jurisdiction". One of the issues raised in the case of Jason Smith was whether on the true interpretation of article 1 British troops operating on foreign soil fell "within the jurisdiction" of the United Kingdom.

Soldiers are human beings and they are entitled to the same protection in principle as other people. How that applies on a battlefield is clearly different from how it applies on a sports field but the principle remains the same. If a commanding officer has to take an urgent decision to send his men into mortal danger he would not, as some commentators wrongly suggested at the time of the High Court and Court of Appeal decisions, have to agonise over whether he or the Ministry of Defence would be sued for negligence or for a breach of human rights. The law does not require anyone in the clash of battle to make decisions in the way he would in an armchair and with limitless resources.

The Supreme Court allowed the appeal of the Secretary of State in part and in doing so arguably retarded the development of human rights law.

Among other points, it ruled (Lady Hale, Lord Mance and Lord Kerr dissenting) that a member of the state's armed forces was not, simply by reason of his or her personal status "within the jurisdiction of the state" for the purposes of article 1 of the European Convention on Human Rights wherever he was in the world. It ruled article 1 jurisdiction was essentially territorial in nature. A soldier in the UK or on a UK base abroad would be within the KK jurisdiction but abroad he would not enjoy human rights even when he was in fact acting as the arm of the UK state.

Lord Mance, dissenting, considered that as an occupying power in Iraq, the UK had under international law an almost absolute power over the safety of its forces. The relationship was not territorial but depended on a "reciprocal bond" (Para 192) of authority and control on the one hand and allegiance and obedience on the other. In his view the Strasbourg court would hold that the armed forces of a state were within the meaning of article 1 and for the purposes of article 2 wherever they might be. Lord Kerr agreed. He noted, referring the state's control of its soldiers (Para 330):

> If a state can "export" its jurisdiction by taking control of an area abroad, why should it not equally be able to export the jurisdiction when it takes control of an individual?

The court ruled that it was unlikely that when states signed the European Convention on Human Rights in 1951 in the aftermath of the Second World War, they would have regarded it as desirable to extend the protection of the right to life to troop operations.

That reasoning is unhelpful for two reasons.

First, the human rights code is a "living instrument" not an inert slate of rules. What human rights meant in 2010 must be judged by today's standards and expectations not those of 1951. We do not today apply equal opportunities principles of the 1950s so why should we apply stale human rights standards now? The American Constitution and the US Bill of Rights cannot be judged today, for example, on their 1787 and 1789 meanings of political rights because when they were drafted they excluded everyone who was female or non-white. You cannot interpret what those old documents mean today by asking what the drafters would have thought because they were mostly racist and sexist. The human rights code is a living instrument because its provisions change organically as society develops – all human rights have changed their meanings and applications since 1951.

Second, had the idea of extending the 'right to life' to troops been debated by the ECHR signatory nations in 1951, it is quite possible that in the wake of the holocaust – the politicians might have thought that no-one by their race, religion, *or occupation* should ever be placed outside of the category of those attracting human rights. The adjectival qualifier 'human' includes soldiers on foreign soil. Giving the right to life to soldiers does not mean they must be protected from danger – that would be risible nonsense – but it does mean they cannot be treated as subhuman like soldiers in the First World War.

The dissents in Smith are powerful and they will surely one day come to represent the law. In 1928 (*The Supreme Court of The United States: its foundation, methods and achievements – an interpretation*, 1928, New York: Columbia University Press, p. 68) the American Supreme Court judge Chief Justice Hughes observed that "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day". The lawyer Peter Beneson was appealing to a similar spirit when he founded Amnesty fifty years ago.

No-win no-fee reforms

The bonanza of lawyers' fees under no-win, no-fee deals will be ended under plans announced by ministers to overhaul the funding of civil justice.

Conditional Fee Agreements were first made enforceable under the Courts and Legal Services Act 1990 (as amended by the Access to Justice Act 1999). They were introduced to enable the public to enjoy access to justice (as legal aid was beginning to be cut) by allowing people to sue and pay their lawyer nothing if they lost. They might have to pay the other side's lawyer's fees but that was an insurable risk.

The current law allows lawyers to double their fees under conditional fee agreements (no-win, no-fee) by claiming a success fee of up to 100% on top of their usual fee – e.g. to charge £6,000 for a case that would normally command a £3,000 fee. This is payable by the losing party in addition to the 'After the Event' insurance premium. Success fees cover the costs of cases which lawyers lose on a no-win, no-fee agreement.

A reform of no-win, no-fee agreements should lead to "significant cost savings," Jonathan Djanogly, the Justice Secretary, said, while "still enabling those who need access to justice to obtain it". (No-win, no-fee deals could be scrapped in civil justice reforms, Frances Gibb, Legal Editor, *The Times*, July 27 2010). He announced that ministers would consult on this and other proposals including American-style contingency fees, proposed in January 2010 by Lord Justice Jackson in his landmark report on civil litigation: Review of Civil Litigation Costs: Final Report (December, 2009) http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf

The Jackson report, aimed at cutting the spiralling costs of going to law, would be taken forward by the government "as a matter of priority". Lord Justice Jackson recommended an end to the 100 per cent success fee and also said these costs should not have to be borne by the losing side in a dispute. Instead, he suggested, the success fees should be capped at 25 per cent and should come out of a claimant's damages.

Mr Djanogly said that conditional fee arrangements had provided access to justice to a range of people. He said "high costs under the existing arrangements have now become a serious concern, particularly in clinical negligence cases against the NHS Litigation Authority and in defamation proceedings."

Ministers will also consult on other funding methods such as American-style contingency fees, where a lawyer takes a percentage of the claimant's damages in successful cases. Today, such damages-based agreements (DBAs) are only allowed in tribunals.

Whichever system is used, however, there will perhaps always be a residual scepticism in public opinion about the propensity of some lawyers to charge lavishly for their work - an opinion reflected in the old story about a client who went to see a famous lawyer.

CLIENT: Can you tell me how much you charge?
LAWYER: Of course, I charge £500 to answer three questions
CLIENT: Well that's a bit steep, isn't it?
LAWYER: Not really, and what's your third question?