Trial by jury or trial by ordeal?

By Phil Boulten SC

Jury trials are still the cornerstone of criminal justice. The form and function of the jury has altered little for centuries. It has, no doubt, always been a stressful experience for serving juries, but the source of the stress now comes from different quarters.

Juries in criminal cases date back to the thirteenth century. Then they were quite different beasts. The proceedings were initiated by an accusation made by the grand jury, or the jury of presentment. Once a charge was laid by the grand jury, the same jurors formed the jury of trial. What hope did the accused have when the jury was both the accuser and the arbiters of the facts?

During the fourteenth century the practice developed of adding extra jurors to the grand jury to provide fresh opinions at the trial. In 1352, a statute gave the accused the right to challenge any of the indicting jury who were called for duty at the trial.

Initially, the jury were both judges and witnesses. They were called on to act on their own knowledge – often nothing more than village gossip. They were entitled to seek information from 'sources entitled to credit'. So, the jury had a double dose of pressure. Not only did they have the stress of deciding the case, they had to provide the evidence as well.

Unsurprisingly, juries' use of gossip and hearsay was often shown to be unsatisfactory. This led to the right of the Crown to call witnesses to give evidence at the trial. Note, though, it was only the Crown who could call witnesses until the seventeenth century when the first defence witness was called in a criminal trial.

Until Victorian times, jury trials were disposed of during a single sitting which might last for as long as 48 hours. A trial rarely lasted longer. In the trial of Lord Cochrane in 1814 the defence opened after midnight, after 15 hours of evidence, and the court adjourned at 3 am until 10 am when the prosecution brought a case in reply. No doubt snoozing juries were commonplace.

Even in the 1880s, London murder trials were routinely heard and determined on one day, the court continuously sitting for more than 12 hours. Sentence was often imposed immediately following a guilty verdict, commonly after midnight.

Until 1870, the jury were placed under enormous pressure to reach speedy agreements by being confined without food, fire or water. Indeed, in the seventeenth and eighteenth centuries, if a jury had not reached a verdict by the end of a circuit sittings, they were detained and taken by cart to the next town's sittings to continue their deliberations.

On one occasion it is said that during a long jury retirement, the bailiff was asked for a glass of water. The bailiff came into court and asked Mr Justice Maule if he might give the juryman water. 'Well,' the judge replied, 'it is not meat and I should not call it drink; Yes. You may'.

Pressures on juries to return verdicts have become much more subtle in the modern era. Twentieth century jury trials bore only some comparison to their ancestors. In New South Wales, both in Sydney and in country districts, Quarter Sessions trials were, for the most part, heard and determined in days, not weeks, and jury deliberations were usually confined to hours, not days. This was so when I had my first exposure to District Court jury trials as a solicitor in the late 1970s and early 80s.

Back then, s 65 of the Jury Act provided that,

> Where the jury upon the trial of any felony or misdemeanour have retired more than six hours, if it be found, after examination on oath of one or more of them, that they are not likely to agree, the court or judge may discharge them.

It was actually quite uncommon for juries to deliberate for more than six hours and, where they did, subtle and sometimes not-so-subtle pressure was applied by the trial judge to obtain a verdict.

Up until the 1970s, juries were sequestered. Usually they slept in dormitories (segregated by sex) under the control of the sheriff. In more recent times, when a trial judge ordered the sequestration of a jury, they were often bussed to hotels. When I was a younger barrister it was a relatively common sight to see the Kingsford Smith Transport minibus shuttling between Taylor Square and the Koala Motor Inn in Oxford Street with jurors on board.

But even where the jury was not locked up, there was significant pressure to reach a quick verdict. On the day that deliberations were due to commence, the jurors would arrive, without much forewarning that, should they not reach a verdict by 4.00pm they may be required to stay on. The jury would often be sent out

late in the afternoon fully expecting to be sent home shortly after 4.00pm as they had on every other day of the trial only to find themselves still locked in the jury room well past 5.00pm and nothing said to them at all. They quickly got the idea and verdicts were often delivered at 5.15pm without further prompting.

If the jury was still deliberating about 6.00pm, the trial judge would send in the sheriff to take orders for dinner. This step also operated to resolve outstanding issues. But it was relatively common to receive verdicts as late as 9.00pm when the prospect of a night in the Motor Inn was becoming more likely. It was common enough to have to come back on Saturday morning for a verdict.

Judges would often call a deliberating jury into court to ask how they were going or to invite them to seek assistance. Trial counsel would often seek the discharge of an apparently deadlocked jury soon after six hours had expired.

Over the last 20 years, though, trial judges in New South Wales have taken quite a different approach. Now juries are told that they can have as long as they like, to set their own sitting hours and to feel under no obligation to return speedy verdicts whatsoever. It is entirely regular to have to wait days for a verdict – even when the evidence has only taken one or two days. Juries now deliberate for weeks at a time with very little judicial prompting to reach a verdict more quickly.

This approach is not universal. Practitioners in other states and territories are surprised at how patient judges are here with our juries. In most other Australian states, week-long jury deliberations are rare. In Queensland, Supreme Court juries are still quite commonly sequestered and verdicts are usually delivered within a day or so.

The NSW approach has generally been regarded as being much more considerate of jurors. But I don't think I'm the only one who becomes increasingly agitated by a jury's apparent difficulty in reaching a verdict as time marches on. As a jury reaches the end of its first week deliberating and spills into another, one cannot help wondering what the atmosphere is like in that jury room.

When the court convenes and jurors are present, you often see red faces, hunched shoulders, scowls and tears. There is visible evidence of the pressure cooker at work.

In April 2010 the attorney general of Western Australia approved the publication of a very insightful survey of juries in that state that had been conducted by Associate Professor Judith Fordham, a well-regarded practising criminal trial barrister. The publication of the Fordham study, *Juror Intimidation?*, provides a useful and rare view into jury room deliberations. The report was prompted by concerns that a number of high profile jury trials had resulted in acquittals in circumstances where juror intimidation was suspected. Of course, suspicion fell onto the associates of the accused, in one case a notorious outlaw motorcycle gang. But the results of the survey failed to uncover any actual intimidation by corrupt conduct from lawyers, their clients or criminals. Rather, the most common and real form of intimidation that jurors experienced was found to be at the hands of fellow jurors in the jury room.

This is a matter of some real concern, It is also hardly surprising. The ordinary dynamics of any committee or small group meeting suggest it is likely that one or two powerful personalities will play a dominant role in the group's deliberations. Many trial lawyers can recount war stories of audible brawls from jury rooms, broken furniture and sobbing jurors. The longer that juries are left to deliberate without careful judicial guidance, the more likely it is that verdicts will be delivered because of jurors' capitulation to pressure. I suspect that most such verdicts result in conviction, not acquittals.

Some simple and informal practices could guard against verdicts by oppression. The jury's deliberations could be broken by 'time out' at the direction of the trial judge – say five or ten minutes per hour. The judge could convene the court a number of times during the course of the day to simply remind the jury that they are entitled to assistance if they need it. After a reasonable time, a judge could proactively ask the jury if they were having difficulties with their deliberations – much as judges used to 20 years ago.

The burden of deliberating upon a verdict is heavy enough. People are not used to being locked up with each other for days at a time, let alone with a view to forcing, not just consensus, but unanimity of opinion. Deliberating for days and then weeks is a modern form of deprivation of liberty, not too dissimilar to the denial of food, fire and water.