The Verdict of the Jury: An English Perspective

by David Hacking

Accused of "unlawful and tumultuous assembly . . . to the disturbance of the peace of the lord said the king," William Penn (later to play an important part in American history) and William Mead stood trial at the Old Bailey on September 3, 1670. The prosecution's case was weak, but the judge, Recorder Thomas Howell, the Mayor of London, Samuel Starling, and the flanking Aldermen and Sheriffs were determined to secure verdicts of guilty. At the end of the evidence, it took the twelve men of the jury one and a half hours to reach verdicts of not guilty for Mead and not proved (in effect a verdict of not guilty) for Penn, but the Mayor and his friends were not to be deterred. Recorder Howell rounded up the jury:

> Gentlemen, you shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco; you shall not think thus to abuse the court; we will have a verdict, by the help of God, or you shall starve for it.

And, without more ado: "The Court swore several persons, to keep the Jury all night without meat, drink, fire, or any other accommodation; they had not so much as a chamberpot, though desired."

Edward Bushel and his fellow jurors were not made of timid stuff. At seven o'clock the next morning, Sunday, they were brought back before the court. Again, through their foreman, they refused to return the verdicts sought by the court. The threats from the Bench grew in ferocity:

> *Edward Bushel:* No, my lord, we give no other verdict than what we gave last night; we have no other verdict to give.

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> *Mayor Samuel Starling:* You are a factious fellow, I'll take a course with you.
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> *Alderman Sir Thomas Bloodworth:* I knew Mr. Bushel would not yield.
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> *Bushel:* Sir Thomas, I have done according to my conscience.
>
> *Mayor Starling:* That conscience of yours would cut my throat.
>
> *Bushel:* No, my lord, it never shall.
>
> *Mayor Starling:* But I will cut yours as soon as I can.

Court Yields

Unable to restrain himself any longer, William Penn shouted from the dock: "If Not Guilty be not a verdict, then you make of the jury and Magna Carta but a mere nose of wax." Citations from the Great Charter of England made no impression upon the Recorder, who complained, "It will never be well with us, till something like unto the Spanish Inquisition be in England," threatened to have the jury "carted about the city as in Edward III's time" and ordered the unfortunate jurors to be, for another day and night, locked up without food and water. On the third day, the court yielded. At seven o'clock on Monday morning, it accepted the jury's verdict, now not guilty for both accused. But this was not the end of the matter. Each member of the jury was fined 40 marks and ordered to be detained in Newgate Prison for following (in the words of Recorder Howell) their "own judgments and opinions rather than the good and wholesome advice which was given you; God keep my life out of your hands . . ."!

It is, therefore, no surprise for this English lawyer to learn that, of all the creatures of the English common law adopted into administration of justice here, none appears to be more zealously guarded than the trial by jury. In contrast, in my country, the role of the jury trial in

recent years has diminished steadily. In England and Wales (Scotland and Northern Ireland possessing separate jurisdictions), there is little use of the jury in civil actions. Parties in certain civil cases, such as in defamation and false imprisonment actions, still have the right to ask for a trial by jury, but there is no such right in the bulk of other civil litigation. For example, the litigant has no right to demand a jury trial in a negligence personal injury action either on the issue of liability or on the assessment of damages. These are tried by a judge sitting alone, whether it is in the High Court or (because of a lower damages claim) in the County Court.

Moreover, where trial by jury has been retained, the litigant has only the most limited right of inquiry into the background, prejudices and beliefs of a prospective jury member. In England, a litigant has seven peremptory challenges, for which he has to give no reason. The challenge has to be made before the oath is completed and therefore, in a criminal trial, the accused does not necessarily know whether the juryman, who is to try him, can read or write. After the seven peremptory challenges, the litigant in England does have an unlimited number of challenges "for cause," but since he cannot question the prospective juryman except in rare circumstances, challenge for cause must lie in some prior knowledge of his own or his advisors, such as recognition of a prospective juror as a person who has a known prejudice against him, his family or his class. In England, therefore, it is rare for a jury not to be empanelled within four or five minutes of commencement of a trial. Here, it is sometimes a matter of days.

More Restrictions

With the Criminal Justice Act of 1967 came further restriction upon the jury trial. Under this act, majority verdicts were introduced. Juries still are encouraged to reach unanimous verdicts by the prohibition of a majority verdict within two hours of the commencement of deliberations. However, after two hours have elapsed, the court is entitled to receive either guilty or not guilty verdicts upon a jury majority of ten to two or eleven to one.

In the foreseeable future, the role of the jury in England may suffer further diminution. It has been argued for some time that many complex fraud trials are beyond the comprehension of the average group of citizens who may be expected to serve on juries and who, as a group, have had little, if any, experience in fields such as accounting and who are unaccustomed to sitting for days on end sifting through and evaluating complicated commercial documents. In such cases, it has been suggested that upon the application of either the prosecution or the defense, the court should have discretionary power to order the trial to take place before a group of assessors (formed of professional accountants, men of commerce, bankers and the like), instead of a jury of twelve citizens selected at random.

It would be nice to conclude that both the diminution of the jury trial in my country and the wider preservation of it here result from research and reflect differing social and community needs in our two countries. Although there has been research on both sides of the Atlantic, I fear it has been of little influence. Certainly in England both the progressive abolition of the jury trials in civil litigation and the introduction of the majority verdict were the products of expediency, not research. With an ever-increasing weight of cases on the courts, trials presided over by a judge alone have been found, on the whole, to be more efficient, more expeditious and less costly. This movement toward judge trials also has been encouraged by the changing economic and fiscal structure of English society, which has made it much less attractive for an English barrister to remain in practice after he has reached the age bracket of 45-55 years. This development has resulted in nearly every competent and experienced trial lawyer seeking a judicial appointment. Although not all are perfect, and none are perfect all the time, the quality of English judges in terms of competence and manners probably has never been higher. We have come a long way from Thomas Howell and his contemporaries!

American Expediency

On this side of the Atlantic, it seems that expediency has taken different forms. There has been the movement in several states toward eight, seven or even six member juries, toward majority verdicts, and sometimes toward both. The weight of criminal trials, especially in New York, has compelled lawyers and judges into plea bargaining arrangements which surely would never be countenanced in times of less pressure. Similarly, in civil litigation here, judges in pre-trial conferences feel compelled to play a forceful role in bringing cases to settlement—a role apparently less restrained because of the knowledge that the final decision at trial, if there is one, will rest with members of the jury and not with themselves.

A few years ago the Penal Research Unit at Oxford University studied the working of juries at criminal trials at the Oxford Quarter Sessions. After the jury had been selected and sworn for an actual trial, the researchers invited a further 12 members out of the jury panel to act as a shadow jury in the same case. This shadow jury had seats in the courtroom, heard the case in identical manner to the real jury and, when the real jury was put in charge of the jury bailiffs to retire to consider its verdict, the shadow jury was taken to a room at Oxford University, also to consider its "verdict," but with a recording machine to tape its discussion. At the verdict stage, the real jurors returned their verdicts in open court while the shadow jurors "returned their verdicts" to the researchers. All those who later listened to the taped discussions agreed that the shadow jurors all had taken their duties seriously.

The final report of the Penal Research Unit is yet to be published, but is unlikely to bring comfort to trial lawyers in England. Those lawyers who have read the transcripts were disturbed by the lack of logic which ran through the jury's discussions; by the variety of anec-

dotes, particularly concerning sisters, cousins and aunts, told in their discussions; by the quantity of "new evidence," not being evidence taken at the trial, which they used to assist themselves to their verdicts; and by the dominant, sometimes dictatorial, roles by which some took charge of the jury's discussions and final verdicts. On the other hand, their discussions were markedly free from ethnic or social bias and often were directed, however illogical the journey, to reaching "fair" decisions free from legal trappings—and certainly free from counsel's arguments, which were usually ignored! Interestingly too, 75 percent of the verdicts of the shadow jurors correspond with the verdicts of the real jurors. Sometimes the jurors' desire to secure "fair play" was well judged and sometimes not.

One case heard during this experiment concerned a young man accused of driving a motor bike while disqualified from doing so by a previous court order. During the course of the trial, the defense admitted that the young man was a disqualified driver. The issue, therefore, was solely whether this young defendant had driven the bike or whether the vehicle had been conveyed to its destination by some other means.

The Evidence

The evidence covered a short compass. The defendant had been with his brother. A police constable had seen the two brothers on the motor bike, with the brother driving and the defendant as the pillion passenger. While at a petrol station, the constable, believing the brother had stolen the bike, arrested him. In the meantime, the defendant put some petrol into the bike and disappeared. Twenty minutes later, the police constable found him and the motor bike at his house two miles away. While there, the constable noticed that the engine of the motor bike was hot. At trial, the defendant stated that he had not driven the motor bike. He alleged that he had been waiting at the side of the petrol station for his brother to return when a man, whom he had seen only once before, whom he had never seen again, and whose name he did not know, happened to pass in a pick-up truck and offered him a lift home. The defendant asserted that he then had put his motor bike on the back of the truck and, by this means, had got himself and the motor bike home.

It so happened that the police constable, on the evening of the incident, did not appreciate that the accused was a disqualified driver. It was not until a few weeks later that the constable, on checking some records, realized that the accused had been disqualified a month earlier by the Exeter Magistrate's Court in Devon.

Both the real jury and the shadow jury returned verdicts of not guilty. Under their duty of silence nobody will ever know how the real jurors reached their verdict. The researchers, however, did learn how the shadow jury reached a similar verdict. In this instance, the jury was dominated by one man who proceeded to lecture his fellow jurors upon "evidence" which did not form part of the evidence of the trial and which also was erroneous. He told them, in terms, that he knew about the disqualification procedure. He knew "for a fact" that all policemen within the city of Oxford Constabulary each day had to memorize all disqualified drivers who lived in the bounds of the city. Hence, since the constable did not recognize the defendant at the time as a disqualified driver, this juror brought his fellow shadow jurors to the surprising conclusion that the prosecution had not proved the young man was disqualified, totally ignoring the production of the Court Order of Disqualification and the admission by defense counsel. The underlying discussion, however, revealed that members of this shadow jury felt that the police had been "vindictive" toward the young man and his brother, although the reasons for this were not plain.

In both our countries, we share the belief that all men and women should be "equal before the law." Not only should the same rights and privileges extend to any person who appears before the courts, but like cases also should be given like treatment. The weakness of jury trials is that they do not provide such uniformity of decision. The Oxford Penal Research Unit found that juries provide unreliable verdicts in simple cases. There is greater doubt of juries' ability to return verdicts consistent with the evidence in bigger and more complex cases. In the telling words used by a director of a jury research unit here, referring to smaller juries being less predictable, "it's like playing roulette."

Consistency

In England, from court to court, judges sitting alone in civil cases have proved more consistent in their decisions. Judges also have shown themselves more capable of keeping their decisions, whether they admit it or not, within the confines of social policies. In contrast, juries in defamation trials have awarded plaintiffs damages widely varying in quantum and often quite disproportionate to other assessments of pecuniary value in English society. With the much wider use in this country of the jury in civil trials, and with much less guidance from the bench (an English judge sums up the facts as well as directing the jury in the law), I believe the problem to be more serious.

Yet the jury trial does remain of supreme importance. It offers a real opportunity for every person in the community to participate in the administration of justice. It is a tribunal with which everyone can feel in contact especially if, as now in England, every person over the age of eighteen years is eligible for jury service. It is, above all, a system of justice which people trust. The occasions may be less frequent, but the jury still is needed to protect the weak from the strong.

A recent story, not lacking authenticity, illustrates this point. Some 300 years after William Penn's trial, a well-known English film star was acting as the foreman of a jury in a criminal trial at the Old Bailey. The evidence was overwhelming against the accused, but the judge was impatient and irritable. Much to his surprise, and annoyance, after only five minutes of retirement the jury returned and, through their famous foreman, politely

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returned verdicts of not guilty. That evening, one of the court staff was clearing papers out of the juryroom. He found placed at the table in a position where the foreman of the jury may have been expected to have sat, a piece of paper with the following questions and answers printed out in clear legible writing. They ran as follows:

1. Question—"Is the judge a bully?"
   Answer—"Yes."
2. Question—"Has he bullied us to return verdicts of guilty?"
   Answer—"Yes."
3. Question—"Are we going to return verdicts of guilty?"
   Answer—"No."

If the Oxford illustration showed the weakness of the jury trial, this one must show its strength.

I believe we should be directing our attention not to the diminution of the jury trial, but to its adaptation into our complex present day society. In a sense, we need to go back to the origin of a jury trial of citizens, in the words of William Penn, being tried by "lawful men [and women!] of the vicinage." Consideration should be given to placing prospective jurors into various categories. There should be the general category, as of now, for simple cases (such as for petty crimes). There could be special categories of jurors more able to comprehend, and to try according to the issues, the more complex cases, such as corporate frauds or medical malpractice. Nobody should underestimate the administrative or constitutional difficulty in selecting juries of men and women of commensurate experience to the litigant and to issues of the trial, nor should anyone underestimate the value of a jury capable of doing justice according to the evidence. If this results in erring lawyers being tried by juries of fellow lawyers, then so be it!

In the meantime we will all have to live with Jeremy Bentham's admonition, of nearly two centuries ago: "I look upon [the jury trial] as an institution admirable in barbarous times, not fit for enlightened times, but necessary as matters stand in England"—and, I daresay, in the United States.