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FOREWORD

COMMUNICATION AND INVESTIGATION IN 2011: CAN OUR JURY SYSTEM COPE?

BRIAN BARKER*

I am privileged to have been asked by the Symposium Editor, Nancy Marder for some thoughts from “this side of the Pond,” and I would like to share my perspective on what is viewed as a growing problem in England and Wales.

For a century, one of the foundation stones for the fair operation of the jury system in England and Wales has been the rule that the decision of the jury must have been made while the jurors were together, and based only on the evidence that they all heard in the courtroom. Secondly, the sanctity of discussion and the forbidding of media investigation gave the jurors protection from subsequent inappropriate questioning and the ability to melt back anonymously into their daily lives. This is now under threat. With alarming speed, new methods of information gathering and distribution are upon us, and concepts of confidentiality are seen as belonging in a bygone age.

Despite the origins of the system where trial would be by your peers, or by those who would know you and something of the prevailing conditions, our rule involves the ideal that minds must not be influenced by something that they may have learned earlier, particularly if it is to the detriment of the suspect. Thus, once a defendant has been charged, the media, on risk of being in contempt, must not report or broadcast matters that might be construed as prejudicial. The overriding object is for jurors to be able to approach their task with an open mind.

Juries, once selected, have for some considerable time been directed that they must not discuss the case with anyone else who is not one of their number. As Lord Chief Justice Widgery wrote in 1973: “[I]t is to be assumed that [jurors] will follow the warning and only if it can be shown that

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they have misbehaved themselves does the opportunity of an application [for a discharge of that jury] arise."

That observation was made in an era uncomplicated by the explosion of the internet both as a research tool and as a social communicating network, while the increasingly habitual use of the mobile phone to communicate in a variety of often unobserved ways was unforeseen. How the landscape has changed. Undoubtedly, over the years, individuals could not resist consulting others, but this was rarely traceable and hopefully the good sense of the group prevailed to "faithfully try the defendant and give a true verdict according to the evidence." Perhaps the high-water mark in flouting the judicial directions (instructions) on this topic was in 1993. It eventually came out that after a jury had retired to a hotel overnight—a practice that has now fallen by the wayside due to budgetary constraints—there came a time after dinner when several of the jurors decided to seek the "help" of a Ouija board in order to communicate with the victim of a murder. Apparently, the spirit duly appeared and gave firm directions as to guilt. It did not take the Court of Appeal many moments to order a retrial.

It was an easy step to ban the use of mobile/cell phones during retirement, but there is now the strong inference that the current habit in everyday life of consulting a search engine to find the instant answer to any query transfers seamlessly to those unanswered questions that inevitably crop up during any trial. Such matters are then easily passed among the jury but are unknown to the other active participants in the trial process, and as such cannot be addressed in open court and could easily result in real unfairness.

Jurors are also directed that they must not conduct their own research. For some, the temptation to conduct their own experiments or to visit the scene on their own is irresistible despite being told not to. Sometimes this results in the individual juror being dismissed from the jury and occasionally the whole jury is discharged and a retrial is ordered. These matters tend to surface because of the "catch all" instruction that if there is anything jurors discover at any stage, inside or outside court, that might interfere with their ability to try the case justly, then they should report it to the

4. See id.
judge. This was originally designed to deal with attempts on behalf of supporters from the outside to "get at" or suborn likely looking jurors, but it is now occasionally used to bring to light the high tech usage of those on the inside whether well intentioned or not.

The current fear is that the opportunity to step beyond the spirit of these instructions has become extraordinarily easy, while at the same time ever harder to discover and to remedy. Establishing the facts as to the extent of the problem and whether what has come out is merely the tip of the iceberg is hampered because direct research as to jury decision making is unlawful following the Contempt of Court Act. Some progress, however, has been made as to behavior. A recent report by Professor Cheryl Thomas of University College London published by the Ministry of Justice provided findings of an extensive empirical research project designed to explore the fairness of jury decision making. One of the areas of investigation did reveal increasing use of the internet by jurors during trials including information suggesting bad character and guilt which would not have come out during the legitimate court process.

An increasingly fertile area of information is Facebook. Discretion on many personal sites often seems to have been thrown out of the window. The number of campaigning and special interest sites are expanding, not all of which could be said to be balanced and objective.

In a related area, Twitter has made significant inroads. At a recent lower court preliminary hearing in London regarding Julian Assange, WikiLeaks, and the application by the Swedish judicial authority for extradition, the District Judge was persuaded to allow journalists to "tweet" the court proceedings. The paramount question was whether the use may interfere with the proper administration of justice, and Lord Chief Justice Judge has now issued interim guidance pending further consultation. He said:

Without being exhaustive, the danger to the administration of justice is likely to be at its most acute in the context of criminal trials e.g., where witnesses who are out of court may be informed of what has already happened in court and so coached or briefed before they give evidence, or where information posted on, for instance, Twitter about inadmissible evidence may influence members of a jury.

5. Contempt of Court Act, 1981, § 8(1) (Eng.) (prohibiting jurors from disclosing their jury deliberations).
I have real concerns that as social norms and expectations change ever more quickly, and hand-held technology is improving by leaps and bounds, the accepted route by which decisions are reached seems to carry less weight. A credible and respected criminal justice system depends on public trust, and the confidence that the process can provide a fair trial—justice must be seen to be done. That process depends on citizen jurors understanding what the problem is and why they must play by the tried and tested rules. We are having to wake up to the problem, and in the short term, revised and more detailed instructions from the bench to the new jury emphasizing their responsibilities of service and their duties would seem to be the way forward. But will that be enough to stem the tide?