

NJCA Conference Museum of Sydney 10th November 2007 Justice Virginia Bell, Supreme Court NSW

The AIJA, in June of this year, held what I think once would have been called a 'seminar' or possibly a 'colloquium' but which we, because we are good communicators, call a 'show and tell'. We invited heads of jurisdiction throughout Australia and New Zealand to send along judges to a day session, where we gave consideration to the results of the survey undertaken by Professor Ogloff.

I understand he was not able to be here this morning, but I expect most of you are aware that the AIJA commissioned research from Professor Ogloff and others. The project is a staggered one, but the first phase of it involved a survey answered by what Professor Ogloff described as, I think, "a pleasingly high proportion of respondents for judges". It was designed to assess judges' perception of how effectively they communicate with juries. So, part of the purpose of the AIJA Show and Tell was to consider the results of that survey, and partly to just look at the different ways, throughout Australia and in New Zealand, judges deal with aspects of jury management and communication with juries, and what it revealed was that there was a very significant diversity in approach.

In particular, it suggested that there is a deal that we could learn, in the Australian states, from New Zealand. In New Zealand, their summings up are a great deal shorter than the summings up of judges in most of the Australian states. There are variations between states, but the noticeable difference is between New Zealand and us, and I think if I were to come up with a single suggestion about how judges might better communicate with juries, it would be that we keep our summings up short.

Dr Clough attended the Show and Tell, and he was one of the people involved in the Ogloff research project. As part of the work that he did, he has engaged in a number of in-depth interviews with judges, principally in Victoria, judges of the County Court and the Supreme Court. One of the topics that he directed attention to is the question of the provision of transcripts to juries, and that is a topic that, for those of you who have read Warren Young's research carried out in New Zealand and published in 1999, the best research ever undertaken on juries, amongst themes which emerge when one reads it is the frustration of juries in not knowing whether they will receive a copy of the transcript, and in being able to properly recollect the evidence that they've heard.

We have provision under the *Jury Act* in New South Wales to send the transcript out to the jury. There is very considerable variation between judges in New South Wales about the extent to which they draw that to the attention of juries. In the results of the jury survey research carried out by the Ogloff team, and confirmed at the AIJA seminar, was the fact that in New Zealand there is a very high incidence of judges sending the transcript out. They do it

without any legislative support for that; the approach that they take is that there is no requirement for a legislative basis. In a short trial in New Zealand, the transcript would routinely be sent out when the jury commenced their deliberations. In a longer trial, it would be common for the transcript to be sent out on a daily basis.

It seems to me that the length of summings up is likely to be a reflection, in part, of whether or not the jury [has] access to the transcript. In New South Wales the hesitancy is explained, amongst judges with whom I've spoken, on a variety of bases none of which I find particularly compelling. They include a concern that if the transcript is sent out to the jury, deliberations will become too long. Even if that were true, it would not be a reason not to do it, if it were a sensible thing. My own sense of it is that we ritually incant to juries, in the course of our summing up, that they and they alone decide the facts but we and we alone tend to have the transcript.

Any person who stopped to think 'How would you determine the facts, in a fair minded way?' would think the prime source might be the transcript. So, let us assume it does take longer. We all recognise that trial by jury is not the most inexpensive to determine issues of criminal guilt, but we accept the cost associated with it because it is the most satisfactory system that we've been able to devise and if, in order to achieve a satisfactory result, it takes a little bit longer, I say so be it. Interestingly, the experience in New Zealand – and this is anecdotal – is that judges there report that they think it shortens deliberations, and when you go back to the research that Professor Young did in New Zealand, and... I don't know whether all of you are familiar with it so I might just recap briefly, because it was a very interesting project.

Professor Young studied 48 criminal trials conducted in New Zealand over the period 1997 and 1998. He had teams of researchers who were legally trained, and they sat through the trial. They interviewed counsel and they interviewed the judge. They interviewed the jurors after the trial, and then they went back and they interviewed the jurors after a further interval. What made it such a valuable study was that the people conducting the interviews with the jury understood what the issues were, because they were themselves legally trained and they had been present during the trial. And so, feedback about the extent to which the jury properly took on board the directions that they were given was much more informed than the results of any survey or questionnaire-type study, or the various other efforts in jury research that have been undertaken, including with the use of mock juries.

What emerged from that study, amongst other things, was that a great deal of time is taken up in jury deliberations by jurors arguing about what the evidence was, and comparing their notes, and some arguing with others about the adequacy of their notes. New Zealand judges say that they have been sending the transcript out over the past seven or eight years, as a direct consequence of the Warren Young research, and what they report is that their impression is that jury deliberations are shorter, and that they receive fewer questions from juries during the course of their deliberations.

The arguments in favour of the provision of transcripts seem to me to be compelling. Another argument which I saw emerge from the work that Professor Clough had done was a concern that the provision of transcript in some way in some way perverted the 'orality' of the trial, and that jurors would place too much weight on it. I really have difficulty grasping that. We do have a concern, rightly or wrongly, about jurors placing too much weight on things that they ought not, on prejudices and the like, but how you might place too much weight on the transcript of the evidence on which you are being invited to return your verdict, is a concept that is too elusive for me.

I'm mindful that, certainly in New South Wales, in the district court which is the prime criminal trial court, there has been a difficulty in the transcript being provided in trials that are relatively short. I understand from Ken Taylor, who's been doing work on this, that things are improving and that in any trial of any great length transcript will be provided, and in any trial involving an allegation of a sexual offence. I think the hope is that it will be more broadly available than that.

We need to make sure, as the New Zealanders do, that Court Reporting always transcribe any argument that takes place in the absence of the jury separately to all the evidence that takes place in their presence, so that when a request is made or the judge decides to send a transcript out that can be done without undue delay. That's a standard protocol now, adopted in New Zealand, and it's not one that's beyond our wit to follow. At least may I say, in those short trials in the district court where transcript is still not available, it does seem to be a little more democratic if, at least, no one has access to it.

There remains, of course, a consideration of the requirements imposed on trial judges by Alford and McGee, and more recently by the Court of Criminal Appeal in cases such as *Zorad*, and *Condon* after it, for judges to properly sum up the case to a jury and it is recognised that a component of that requires some reference to the evidence. It seems to me that if we sent the transcript out, that reference could be a very attenuated one. I would like to see, in due course, computers in jury rooms with software of the transcript-analyser variety, and the jury getting not only the hard copy but an electronic copy of the transcript.

In that regard, I'm conscious that in all these debates about how we can better help juries with their task there's discussion of jury 'aids'. It is now very common in New South Wales for judges to give written directions relating to the elements of the offence, and in any trial where the elements of the offence are other than exceedingly obvious, as far as I'm aware, pretty well every judge does that. Those do serve as a useful way for juries to work through the issues that they must decide.

I have no difficulty with juries always being supplied with a book that includes the photographs and other copies of exhibits, if the Crown has the resources to make those available, and witness lists and the like. When one gets to things such as a document which the judge prepares, which neatly sets out,

for example, the circumstances on which the Crown relies in a circumstantial case, I think one is starting to enter into slightly more dangerous ground.

The High Court discussed the question of the extent to which judges might give advice to juries about how they approach deliberations including, in the way of a set of instructions concerning a sort of step-through process in *Stanton [vs.] the Queen* – and I do not understand anything in the joint reasons in *Stanton* to be against the provision of written directions in a way that does encourage a logical working-through [of] the issues in a step-by-step way, provided the judge always makes clear whether they follow that approach or adopt their own...

Coming back to the notion of the provision in due course of computers and an electronic copy of the transcript, that would overcome many of the problems because the jury could do what we do; they could prepare their own summary if that is what they wanted; they could, with the use of transcript-analyser [software] put together their own witness list and generate the sort of reports that that software enables them to do. So, all of those things, to my mind, would be sensible and practical ways of assisting the jury with their task.

Coming back to the question of what is the minimum requirement of a proper summing up, it would remain that the judge would have to refer to the evidence in order to explain, by the legal principles, by reference to the evidence but you could do it by reference to parcels of evidence, safe in the knowledge that they had the transcript and did not require you to read it out to them.

I should say, my own practice, at the commencement of a trial, is to explain to juries that in due course I can send out a copy of the transcript to them, or the transcript of particular witnesses if they would like that. I make clear to them that if they would prefer it I can reconvene the court when they are deliberating, and I'll read it to them. Interestingly, I've never had them request the latter, and I don't know that I've ever had a trial when they haven't requested at least parts of the transcript. I should say that I have sent out the whole of my summing up in written form, but that I would not do that without a request.

In a long and difficult murder trial involving multiple accused, a very conscientious jury, at the end of the summing up, having patiently sat through what I regarded as the minimum amount of reminding them of all the evidence, wrote out a note before they retired saying 'We'd like a copy of all that you've had to say, in writing, thank you' and with the concurrence of all counsel in that case I did that. The Court of Criminal Appeal has looked at it; of course there's no provision under our Jury Act to do it, but Hal Spurling looked at it in some detail in a case called [*Tez Almus*] and concluded that it was plainly open to a judge to do that; the Court of Criminal Appeal has given that the tick, and it does seem to me sensible in cases where the summing up's prepared and corrected, and that's able to be done.

I also make a practice, in light of the experience in that celebrated [tv] show *Joe's Jury*, of spending a lot of time in opening remarks to a jury directing their attention to the need to appoint a foreman, foreperson, but not necessarily at the first opportunity. I never tell them to appoint their foreperson at the first adjournment of the proceeding; I don't see that there's any particular need to do that. I point out to them that the foreperson enjoys no greater role in any feature of their task than any of the remainder of their number. I point out to them that they may think it convenient, when they are going about their deliberations, to ask their foreperson to act as the chair, in order to ensure that all of them have an opportunity to contribute to their discussions and that everyone's contribution is sought, but that that is a matter for them. It may happen, by the time they come to retire, that they have decided that another of their number has better skills to fulfil that task, in which case they could ask that person to chair their discussions, if they thought having a chair for their discussions was going to be a useful way to approach matters. I also point out to them that, having selected a foreperson, if they think that they would prefer someone else that, again, is entirely open to them, and I should say it's exactly what's happened in the trial that I'm presently doing.

That advice concerning the role of the foreperson seems important not only in light of *Joe's Jury* but, again, when it comes out in the research that's been done, not only the Warren Young research but Michael Chesterman, in a survey of jurors that was designed to really focus on what is the impact of prejudicial publicity on jurors, which elicited quite a deal of information about how they go about their processes beyond that brief. I think that in all the research one sees that as an area for emphasis.

There is a suggestion coming out of the research that it would be helpful for judges to give some advice, again in a non-prescriptive way, about how juries might approach deliberations. As I've indicated, I do in a very broad way but I think the time has come and I am proposing to now, in light of the research results, point out that whilst this is merely a suggestion it might be that they would find it helpful to work through the issues that have been identified by the parties, by reference to the evidence in a structured way, before they take a straw poll, because the research is tending to suggest that those that take the straw poll first may have more difficulty than those who work through the evidence before doing that.

Let me move to the next thing, which relates to the complexity of directions. I note that in that respect, in his report, Professor Ogloff noted that "Too often communication procedures are adopted to avoid reversal of decisions on appeal, for improper instructions to the jury. The concern of trial judges is not simply their own reputation but to ensure that the trial participants do not have to endure a retrial". Elsewhere he observed that a number of judges had commented in their survey responses on the need to "speak to the jury, not the court of appeal".

Might I suggest caution with that approach? I think the thing that would irritate me more than anything else, if I had conscientiously gone about my work as a juror, was learning that the trial had been the subject of a successful appeal

because of some failure on the part of the trial judge to correctly direct the jury. Many of us who are engaged in the business of directing juries may feel, as I do, that we have let the law get into a state where we give excessive warnings to juries, and excessive judicial advice about how they should approach their task in light of the peculiar experience of the court about these matters. I would like to see some change in that, but if that change comes then it is change that must come from the High Court, or as the result of legislative change. It may be that the High Court is going to move away from what I would see as the 'high-water mark', which was the decision of the court in the case of *Doggett*.

Many of you will be familiar with it; some of you may not, a case in which a trial judge dealing with a number of offences of sexual assault, that were offences said to have been committed many years before the complainant first made her complaint, did not direct the jury in relation to all of the counts, consistently with *Longman [vs.] the Queen*, that it would be dangerous to convict having regard to a number of factors including the inability of the accused, after such a long interval, to necessarily test and meet the allegations that were made. It is to be noted that in *Doggett*, very experienced Queen's Counsel who appeared for the accused did not seek the advice. In a strong dissenting judgment, Chief Justice Gleeson pointed out the very strong common sense [reason] why that was so, because it would have directed attention to the question of corroboration in circumstances where it was in bucketloads.

Nonetheless, a majority concluded that the trial had miscarried by reason of the omission of that direction. *Doggett* is salutary for all of us, at first instance; if the levers are to be changed it isn't up to us to do it. I think what is encouraging, certainly in New South Wales, is that in February of this year the Law Reform Commission was given a reference to consider the complexity of directions to juries in the course of summings up and that is, or was until yesterday, the prime focus of the Honourable James Woods' work at the Law Reform Commission. He has since taken on a small enquiry that will absorb him for the next six or seven months but in the longer term we will see, I am hopeful, some real pressure for change emerging from that.

But may I say, in such time as the chairperson allows me, the other side of this coin about complexity is that when you look at some directions, I think one of the most complex are the directions that a judge has to give a jury when dealing with provocation in a murder trial. When I look at those directions, they are difficult but they are difficult because, over years of development and refinement, the principles that the High Court has articulated concerning the circumstances in which it is appropriate that an offence that is otherwise murder be categorised as manslaughter are principles that involve very considerable subtlety and refinement. But they're not principles that people working conscientiously, and having them properly explained to them, can not absorb.

I can't imagine a judge in New South Wales who would direct a jury on provocation and not send out written directions, and I have no reason to think

that twelve randomly-selected citizens, working their way through those precise and complex directions, ought not be expected to get it right.

I thought it was heartening when about three or four years ago David Kirby, I think it was, was presiding over a trial where he instructed the jury on provocation, and back came a question which – and I have to interpolate here, the accused was a person of non-caucasian ethnic background. The jury's question was, when they came to consider whether an ordinary person in the position of the accused might have so lost his self-control as to have formed the intent to kill or to do grievous bodily harm, were they to consider an ordinary person of the ethnic background of the accused?

The jury were clearly, or at least some of their members, attracted to the view that Justice Mc Hugh has championed in the High Court in *Mach Antonio* and elsewhere, but so far without commanding success of the majority, but I think that when we get together and talk about complexity, and the difficulty, and the need to speak in plain English to juries, we need also to bear in mind that some of the concepts with which we are dealing are concepts involving considerable subtlety and degree of complexity. We should not be patronising in the assumptions we make about our fellow citizens' ability to work through those, given a set of the directions in writing and an adequate explanation in the summing up that accompanies them.

But a judge who decides to, sort of, 'get down on the farm' with the jury and talk in plain English, and directs on provocation and goes off-script, is a pretty foolish judge. It's very easy, when you're speaking in an off-the-cuff way, to use the word *would* when you should use *could*. The moment you do, all the hard work of the jury goes west, because it's a certain successful appeal in the Court of Criminal Appeal.

Can I just come finally to this, because it's something that Malcolm deals with in his book, and I wanted to put in a plug for the contrary argument, and it's Malcolm's frustration with the directions that we give about not conducting internet searches. Malcolm points out that it's, as he sees it, quite wrong for us to endeavour to constrain juries from applying, in some sense, the knowledge that they have, which the lawyers have been too silly to lead evidence about. We have in New South Wales, as they have in Queensland now, legislative provisions that do make it an offence for jurors to make internet enquiries concerning the accused or anything touching on the trial until the trial is over, and because we have those provisions we now routinely tell juries about that in the course of opening remarks which, hopefully, are not too intimidating.

What I try to do, in explaining to juries that prohibition, is to point out the reason for it. Any criminal trial involves an investigation into past facts and, without wanting to sound like a post-modernist from the University of Macquarie, you don't have to be engaged in notions of relativism to recognise that it might be you won't always get to the truth. Our system does aim to find out, as best we can, the truth of a set of circumstances but more important

than that we recognise that it's not an enquiry for the truth, as individuals may differently perceive it, in any fashion. We do have rules of evidence, and we have rules of evidence because we recognise that a person ought not be convicted of a criminal offence on, say, third-hand hearsay or the like.

What we've endeavoured to do is to develop a system as fair as we can make it, and a system that is fair is a system where the Crown and the accused know exactly what it is that the jury will make their determination on. They can address their arguments; they may be good arguments, they may be fatuous, but they know what the material is that the jury is going to determine their verdict upon and if there's an issue about whether you could see the accused at 50 metres in Greenacre Park then, rather than the jury going out and having a look and working that out for themselves, we have a mechanism to do it but one that enables the parties to understand that the view conducted in the presence of the parties is one that can be tested, in the sense that if lighting conditions have changed, or if there was something singular about the events at the time of the offence, evidence can be led on the topic.

It is for reasons of fairness that we instruct juries not to make their own investigations, and for reasons of fairness we commend they should not do that even when they might happen to have information of their own, or have the means of getting it, concerning matters which might seem to them to bear relevantly on the result.

I find, when I direct juries, emphasising the considerations that inform that ban, I don't get the sense that they feel particularly intimidated by the fact that our parliament has introduced an offence, and I get a lot of nodding when I endeavour to explain the fairness that I see underpins that rule. I should say, it's exactly the same rule, of course, as judges applied, in a case of Hughes & Williams many years ago. With the consent of both parties the judge went out and made investigations of an electric railway line. What the judge didn't do was to convey to the parties certain observations that he'd made, which formed the basis of his judgment, which was overturned on appeal.

Thank you.