Book review

Journal Title: Journal of Law and Medicine
Article Citation: 21 JLM 1004
Publication Year: 2014
Jurisdiction: Australia

(2014) 21 JLM 1004


Dr Jacqueline Horan is a Senior Lecturer at the Law School at the University of Melbourne and a member of the Victorian Bar. Her Juries in the 21st Century is a contemporary review of the functioning of the jury system, jury research and scholarly debate about juries in Australia. Its audience is stated to be judges, barristers, instructing solicitors and forensic experts. It is cross-disciplinary and takes account of modern developments in technology which Horan maintains constitute both an opportunity and an impediment to the contemporary functioning of jurors.

Starting with a history of the role of jurors, and the observation that originally jurors tended to be intimately familiar with the local environment and the facts of a dispute, Horan notes that now, somewhat unrealistically, we aspire to jurors coming as a clean slate to their role of judging the facts. She notes the many considerations that can make people ineligible to serve as jurors and the fact that across Australia there is a move to reduce the categories of automatic excuse to jury service in order to render juries more representative of the general community. She describes the most problematic aspects of juror ineligibility as the requirement that they be Australian citizens and proficient in English and the breadth of occupational ineligibility. She criticises the entitlement of pregnant women to exempt themselves automatically from jury service in New South Wales and the fact that persons of arbitrarily selected ages can similarly claim exemption, although the ages for this in different parts of Australia vary. She raises the issue of jurors seeking to be excused on the basis that they have been victims of a crime, such as a sex crime, noting that this is unrealistic.

Horan deals with the sensitive issue of what identifying information about jurors is provided for the objection process. She explains that after incidents of problematic contact with jurors, New South Wales, South Australia and Western Australia moved to a numerical identification system, although counsel are given the potential juror’s name, occupation and suburb prior to the peremptory challenge phase of jury selection. She notes the existence of theories about the propensities of women to be harsh in their decisions. She cites mock studies as having identified that women are more likely to convict in cases involving drug trafficking, child sexual abuse and rape and more likely to reject an insanity defence than men. She observes, however, that it is the underlying attitudes towards certain types of criminal of crimes that are the best indicators of verdict preference (p 31).

Horan identifies that defence counsel have suggested that it is their tendency to favour those on a jury panel whose name or appearance suggests a similar cultural background to that of the defendant. She instances an occasion when a Northern Territory prosecutor attempted to challenge all persons of an Indigenous background in a trial of an Aboriginal defendant. In terms of occupation as a factor in the jury selection process, she observes that jury research suggests that jurors with higher status occupations are more likely to be chosen as a foreperson and that, while such persons may be very influential in jury deliberations, there is no evidence as yet to suggest that such persons might
be biased toward the prosecution or the defence. She argues too that age is not a good characteristic upon which to base a juror challenge. Her position is that the link between a juror’s demographics and their verdict preference is based on implicit personality theories that are not well grounded in social psychology and the notion that experienced barristers are capable of psychoanalysing jurors during the peremptory challenge process is inconsistent with extensive research into psychological prediction (pp 38-39). She notes studies from the United Kingdom and the United States which suggest that gender, age, occupation, education, political orientation and prior jury service have only a minor correlation to verdicts delivered. Given how uninformed the peremptory challenge process is, Horan argues in favour of it being abolished in Australia, as it has been in the United Kingdom.

Horan sets out that the average age of juror participation is about 44 in Victoria and that across Australia there is a slightly higher percentage of women than men who serve on juries. This constitutes part of the information that leads her to contend that: There is no strong evidence to suggest that Australian juries are not adequately representative in terms of age, gender and occupation (p 43).

Horan wrestles with the issue of whether jurors cope adequately with the complexity of contemporary trials. She contends that the dynamics of group decision-making enhance the quality of decision-making by juries. She argues in favour of juries being a valuable check and balance against judicial bureaucracy and notes that the argument that juries are unable to cope with their task has long been advanced. While jurors believe they are capable of comprehending contemporary trials, no studies have been conducted that monitor real comprehension levels comprehensively, although many have shown some level of juror misunderstanding, particularly in relation to the law as explained by the judge.

Horan reviews four recent Australian and New Zealand juror studies and a United Kingdom study. She finds two common themes from jury comprehension research: that jurors would prefer to have more information and that current forms of communication to jurors need to be modified to address their needs better. In response to a survey by the Victorian Juries Commissioner, some jurors said that they would have been assisted by PowerPoint slides, overheads and laptops for viewing transcript. Horan argues that if juror comprehension of the law and facts of a case are to be improved, courtroom presentations need to include written and visual aids to enhance the oral presentation (p 92). She provides specific practical examples, noting that research has shown jurors are more inclined to follow instructions when reasoned explanations are given with any judge’s admonition.

Horan grapples too with the role of expert evidence given in jury cases, acknowledging that ambiguity and incompleteness are intrinsic to science. She notes the concerns expressed by judges and jurors in surveys conducted on behalf of the Australian Institute of Judicial Administration that experts are too often biased and the difficulty that jurors may not understand statistical probabilities adequately. She also has regard to studies on the CSI effect. She briefly reviews alternative modes of presentation of expert evidence, including court-appointed single experts, expert conclaves, concurrent evidence and requirements that expert evidence be presented consecutively. She notes an Australian study that found jurors’ ability to deal with DNA evidence improved if they first viewed an information video on the subject. In terms of mechanisms such as the use of animations, she observes both benefits and risks, and observes that the future will offer many more sophisticated forms of computer-generated technology with the potential to enhance perspectives on matters the subject of courtroom disputation.

Horan reviews the problems in respect of jurors functioning as detectives but acknowledges that undoubtedly it happens more often than is known. She instances the jury notes from the 1982 Chamberlain trial showing that the jury conducted its own campsite experiment in the basement of the Darwin Supreme Court. More commonly now, of course, jurors are using internet opportunities to do their own checks and research. Given that data are not possible on the forbidden activity of extra-curial research conducted by jurors, but that several recent trials have revealed that, not surprisingly, it is taking place, in spite of judges’ requirements that it not happen, she contends that it means...
that courts should work from the basis that there is likely to be at least one juror who will undertake private research in each trial (p 155). This involves the potential for discovery of prejudicial information about a defendant and the fact that jurors may locate information about parties, sympathetic or prejudicial, that may even be placed on the internet for that purpose. It also raises the spectre of juror blogs and updates, even when they are proscribed by the creation of criminal offences. Controversially, Horan argues that it would be prudent for judges and lawyers to Google themselves regularly to check what is being written about them in cyber space. While expressing reservations about the utility of judges’ instructions to jurors not to conduct their own research, she sets out considerations that might be utilised by judges to optimise the prospect of such instructions’ success.

An associated issue is the existence of adverse publicity about an accused person and its impact upon whether they have a realistic prospect of obtaining a fair trial. Horan argues in favour of routine screening of the internet by parties for such material in order to identify its existence and to enable efforts to remove particularly problematic information that might prejudice a fair trial. She comments (2014) 21 JLM 1004 at 1006

that from a practical point of view an internet order will be most effective when problematic online information is detected early and is located on a minimum number of websites hosted within the jurisdiction of the court (p 193). She argues that such checks are essential in high-profile trials but should be done in all cases, and contends that there is scope for an independent monitoring role to be created in all Australian jurisdictions so as to improve the ability of the courts to deal with prejudicial publicity. Her position is that while technological advances are throwing up numerous challenges to the common law jury system, they also enable us to conduct cost-effective research so that we can identify how the jury system is actually working and what might be done to improve it: This should be embraced as an exciting opportunity for law makers to positively reshape our jury system to ensure that it continues to thrive in the future (p 207).

Horan’s Juries in the 21st Century is an accessibly written book that provides a range of information about the contemporary jury system, identifies problems and indicates potential solutions in respect of the difficulties affecting the role of jurors in Australia. It is based upon simulation studies from psychologists about juror decision-making, surveys and interrogations of jurors, reviews of relevant literature and case law, and interviews with judges and litigation lawyers. It is a rare portal into the real world of jurors. Juries in the 21st Century is well researched and practical. Information that it provides would be of benefit to all barristers and litigation solicitors, if only to disabuse them of assumptions which may not be empirically justified. It can be warmly commended to all with an interest in the functioning of modern litigation involving juries, as well as those committed to procedural reforms directed to improving contemporary litigation processes that incorporate jurors.

Ian Freckelton QC