

Before the High Court

Jury Deliberations and the Secrecy Rule: The Tail that Wags the Dog?

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Abstract

There are few common law rules as tenacious as the rule requiring that jury deliberations be kept secret. ‘Marital rape’ springs to mind as a comparator. It is an apt example because in 1991 the High Court rang its death knell.¹ This article shows if the jury secrecy rule was ever justified, it is no longer so. Legislative change has made inroads into the rule, but without proper attention to the injustice that it may hide. ‘In most, but not all, judgments in this area, the debate has been about the admissibility of a juror’s evidence, not whether the allegation of misconduct is a proper ground of appeal. The tail, however, wags the dog.’²

I Introduction

In the Western Australian appeal case of *Smith v Western Australia*,³ the High Court faces invidious choices reconciling precedent with policy, practice and the maintenance of the fundamental features of the criminal trial.⁴ The context for this challenge is the common law rule of evidence preventing courts from receiving evidence of matters intrinsic to jury deliberations. This well-entrenched rule⁵ dates back to the 1785 English case of *Vaise v Delaval*.⁶ According to Wigmore,⁷ Lord

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¹ Discussed in *PGA v The Queen* (2012) 245 CLR 355; Wendy Larcombe and Mary Heath, ‘Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*’ (2012) 34 *Sydney Law Review* 785.

² Australian Law Reform Commission, *Evidence*, Report No 38 (1987) [219] (citations omitted). ‘It may seem odd that, on the one hand, the law should lay down certain fundamental ground rules as to the operation of the jury system and recognise that deviations from these rules may invalidate a jury’s verdict, and that, on the other hand, it should deny to litigants and judges alike sure means of discovering whether serious irregularities have occurred’: *ibid*, quoting E Campbell, ‘Jury Secrecy and Impeachment of Jury Verdicts’ (1985) 9 *Criminal Law Journal* 132, 154.

³ [2013] WASCA 7 (17 January 2013). See also *Smith v Western Australia* [2013] HCATrans 298 (29 November 2013).

⁴ *Hargraves v The Queen* (2011) 245 CLR 257, 274 [38] ff (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁵ Aside from the Australian and English authorities discussed below, the rule has been affirmed in New Zealand in: *R v Taka* [1992] 2 NZLR 129; *Tuia v The Queen* [1994] 3 NZLR 553; and by the Supreme Court of Canada in *R v Pan*; *R v Sawyer* [2001] 2 SCR 344 (and see Canadian *Criminal Code* RSC 1985, c C-46, cl 649).

⁶ *Vaise v Delaval* (1785) 99 ER 944.

Mansfield was its architect and proponent, stimulating, singlehandedly, a broader common law convention of jury secrecy.⁸ Modern authorities supporting the rule are numerous.⁹ In uniform *Evidence Act* jurisdictions¹⁰ (which do not include Western Australia), s 129¹¹ restates the evidentiary rule, but with (limited) exceptions to support prosecutions for perverting the course of justice, contempt of court and related offences. The rule is also typically supported by state and territory legislation. The *Juries Act 1957* (WA) s 56B(1),¹² for example, provides a partial expression of the rule with a number of defined exceptions relating to corruption, jury research, and the investigation and prosecution of offences of ‘alleged contempt of court or alleged offence relating to jury deliberations or a juror’s identity’.¹³

⁷ John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little, Brown & Co, 3rd ed, 1940) vol 8, 684–5 [2352].

⁸ ‘The confidentiality is not temporary: it is permanent and not capable of waiver. Thus, the duty of the juror to respect that confidentiality continues, indeed it especially applies, after the case is over and the jury has been discharged and dispersed. Nothing could be more destructive of the duty of confidentiality than the juror coming out of court and communicating his or her views about the jury’s deliberations to the media or to persons who are likely to disagree with the verdict which was returned. The rationale of the rule includes the need for finality. A verdict returned in the presence of all of the jurors and on their behalf is not to be open to second thoughts’: *R v Mirza*; *R v Connor* [2004] 1 AC 1118 [142] (Lord Hobhouse). See also Enid Campbell, ‘Jury Secrecy and Contempt of Court’ (1985) 11 *Monash University Law Review* 169, 170.

⁹ A variety from different countries are usefully collected in *R v Mirza*; *R v Connor* [2004] 1 AC 1118 [11] by Lord Steyn: ‘Judges of great experience and distinction have held that it is never permissible to admit evidence of what happened during the deliberations of the jury: *R v Thompson* [1962] 1 All ER 65, 66 (Lord Parker CJ); *Ellis v Deheer* [1922] 2 KB 113, 117–18 (Banks LJ), 121 (Atkin LJ); *Attorney General v New Statesman and National Publishing Company Ltd* [1981] QB 1, 10 (Lord Widgery CJ); *R v Miah* [1997] 2 Cr App R 12, 18–19 (Kennedy LJ); *Roylance v General Medical Council (No 2)* [2000] 1 AC 311, 324B (Lord Clyde); *R v Qureshi* [2002] 1 WLR 518 (Kennedy LJ). The only exception is that where there has been, or may have been, an irregular occurrence of an extraneous nature, which may have compromised the impartiality of the jury the evidence may be admitted: *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1; *R v Hood* [1968] 1 WLR 773; *R v Brandon* (1969) 53 Cr App R 466; *R v Young (Stephen)* [1995] QB 324. The position is similar in Scotland: *Stewart v Fraser* (1830) 5 Murray 166; *Swankie v H M Advocate* (1999) SCCR 1. Subject to differences as to the scope of the exception, a similar exclusionary rule has prevailed in Commonwealth countries: Canada: *R v Pan*; *R v Sawyer* [2001] 2 SCR 344; Australia: *R v Andrew Brown* [1907] 7 NSWSR 290; *R v Medici* (1995) 79 A Crim R 582; New Zealand: *R v Papadopoulos* [1979] 1 NZLR 621.

¹⁰ Uniform evidence legislation has been enacted in six Australian jurisdictions: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); *Evidence Act 2011* (NT).

¹¹ ‘In a proceeding, evidence of the reasons for a decision made by a member of a jury in another Australian or overseas proceeding, or of the deliberations of a member of a jury in relation to such a decision, must not be given by any of the members of that jury’: see *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2004* (Norfolk Island); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); *Evidence Act 2012* (NT). There are some minor variations in the wording of exceptions between these Acts.

¹² ‘A person who discloses protected information commits an offence if the person is aware that, in consequence of the disclosure, the information will, or is likely to, be published.’ To similar effect, see *Juries Act* (NT) s 49A; *Juries Act 1967* (ACT) s 42C; *Juries Act 2003* (Tas) s 3; *Criminal Law Consolidation Act 1935* (SA) s 246. See also *Juries Act 2000* (Vic) s 78; *Jury Act 1977* (NSW) ss 68 and 68A; *Jury Act 1995* (Qld) s 70(7).

¹³ *Juries Act 1957* (WA) s 56B(2)(e); see also *Criminal Code Act Compilation Act 1913* (WA) s 123.

The rule serves the public interest in promoting public confidence in jury trials and ensuring future jurors are not discouraged from their civic duty.¹⁴ It is typically described as serving to:¹⁵

- promote full and frank discussion between jurors during deliberations;
- shield jurors from pressure or censure from the public, the media, friends or family; and
- assist in making the verdict final.¹⁶

Of course, there is a flip side. Public confidence in jury trials is also enhanced by greater transparency and scrutiny of criminal justice processes. As Lord Steyn observed in *R v Mirza; R v Connor*, the response to an accused or an appellant alleging a serious irregularity in jury deliberations that “[w]e shall never know” fits uneasily with modern conceptions of fairness and due process in the criminal justice system.¹⁷ This is why we expect judges to give reasoned judgments and why judges formally direct juries in open court.¹⁸ But the exclusionary rule places jury accountability¹⁹ second to the rationales outlined above because neither trial judges nor appeal courts can enquire into potential irregularities that relate to matters intrinsic to jury deliberations. The expansion of powerful institutionalised and systemised appeal and post-appeal²⁰ structures in the common law world is but one reason why this rule may be past its ‘use by’ date. More reasons are discussed below.

The Appeal

Mark Smith was convicted on two counts of indecently dealing with a girl under the age of 13 years old. The jury deliberated for just over three and a half hours, returning its two guilty verdicts at 6.53 pm, when one juror ‘was somewhat upset’. The trial judge also noted that the jury’s departure was ‘unusually noisy and ... the foreperson was a little slow to affirm that the verdict was the verdict of all members of the jury’.²¹ Further light was shed when, shortly after, an incomplete letter from an unidentified juror was found in an envelope in the empty jury room.

¹⁴ Jennifer Tunna ‘Contempt of Court: Divulging the Confidences of the Jury Room’ (2003) 9 *Canterbury Law Review* 79, 83.

¹⁵ See *Shrivastava v Western Australia (No 2)* [2011] WASCA 8 (14 January 2011) [25] (Pullin JA) (*‘Shrivastava’*); *Rinaldi v The Queen* (1993) 30 NSWLR 605, 612–13 (Carruthers, Sully and Abadee JJ); Tunna, above n 14, 81–93 for a detailed analysis of the rationales.

¹⁶ These reasons are regularly cited, see, eg, Australian Law Reform Commission, above n 2, [219]; *R v Skaf* (2004) 60 NSWLR 86, 92 [211] (Mason P, Wood CJ at CL and Sully J) (*‘Skaf’*).

¹⁷ [2004] 1 AC 1118 [12] (Lord Steyn, dissenting).

¹⁸ This reasoning is articulated by the Grand Chamber of the European Court of Human Rights in *Taxquet v Belgium* (2012) 54 EHRR 26.

¹⁹ Accountability applies to any other functionary who exercises the equivalent sort of power over the individual that is exercised by the jury: see Campbell, above n 8, 194.

²⁰ See, eg, *Criminal Cases Review Commission* (UK) <<http://www.justice.gov.uk/about/criminal-cases-review-commission>>. Closer to home, see the debate and discussion culminating in the *Statutes Amendment (Appeals) Act 2013* (SA), expanding appeal avenues; cf the more ambitious (but unsuccessful) Criminal Cases Review Commission Bill 2010 (SA).

²¹ [2013] WASCA 7 (17 January 2013) [4].

The letter stated: ‘I have been physically coerced by a fellow juror to change my plea to be aligned with the majority vote. This has made my ability to perform my duty as a juror on this panel [sic]’.²²

The West Australian Court of Appeal Court rejected Smith’s appeal that the trial had potentially or actually miscarried because of what the letter indicated. The appellant asks the High Court to quash the Court of Appeal’s dismissal of his appeal (and its refusal to order an inquiry). He seeks an order that, if practicable, a staged inquiry be undertaken to enable to the Court of Appeal to determine an appeal appropriately informed by the juror’s letter and the circumstances it describes. The appeal is based on a two-stage inquiry. First, avoiding the territory of the exclusionary rule, the inquiry would seek to ascertain details associated with the authenticity of the letter and whether its author stands by its contents. If the author does so, then further details are required as to when and where the incident(s) took place and who was involved. A second stage, if necessary, would seek to examine the substance of the allegations. If an inquiry is considered no longer practicable, the appellant seeks quashing of the verdicts.

Chief Justice Martin (McLure P and Mazza JA agreeing) delivered the Court of Appeal decision, holding that a trifecta of 18th-century authorities had settled the jury secrecy rule.²³ Martin CJ also traced various English, Australian and New Zealand authorities to contemporary times, to conclude that the juror’s letter was within the jury secrecy rule and that no authority provided a considered basis in support of a common law exception to it.²⁴ For good measure, the Chief Justice added that if there was a basis for exceptional circumstances to admit evidence intrinsic to deliberations, this letter possessed too many ambivalent facts to come within an exceptional category.²⁵ The contents of the letter were

²² Ibid [3].

²³ *R v Woodfall* (1770) 98 ER 398 (Lord Mansfield); *Vaise v Delaval* (1785) 99 ER 944; *Jackson v Williamson* (1788) 100 ER 153.

²⁴ In particular, regarding English authority, his Honour relied upon the fact that Lord Steyn’s dissenting opinion in *R v Mirza* [2004] 1 AC 1118 was expressly unsupported by majority judgments; and from New Zealand, the case of *Tuia v The Queen* [1994] 3 NZLR 553, 556, which left the case for an exception open, and relied on inadequate authorities (*R v Taka* [1992] 2 NZLR 129 and *R v Papadopoulos* [1979] 1 NZLR 621) to conclude that ‘there can be circumstances raising a sufficiently compelling reason to depart from the general rule’. Martin CJ also added that Gleeson CJ in *R v Minarowska* (1995) 83 A Crim R 78 left open a ‘residual discretion’ relying on the same New Zealand cases and that precedent has never supported allowance for the degree of prejudice to the accused: see *Smith v Western Australia* [2013] WASCA 7 (17 January 2013) [41]–[42], [44]–[45] and that this conclusion was supported by the more recent Western Australian case of *Shrivastava* [2011] WASCA 8 (14 January 2011). Cf discussion below based on *R v Thompson* [2011] 1 WLR 200 [4]–[5]: ‘The rule is subject to two narrow exceptions’ (Judge LCJ).

²⁵ Such factors include the authorship of the note; when it was written; whether the juror continued to hold his or her view at the time the verdict was delivered; the nature of the coercion; and whether it was distinguishable from ‘the robust interchange of views which must be accepted as forming an appropriate part of jury deliberations, and improper intimidation resulting in a juror or jurors acquiescing in a verdict with which they did not agree, contrary to their oath’: [2013] WASCA 7 [37], citing the study by Judith Fordham, ‘Juror Intimidation? An Investigation into the Prevalence and Nature of Juror Intimidation in Western Australia’ (Report submitted to the Attorney General, 17 August 2009) (Murdoch University and University of Western Australia, 2010) 62 <http://www.department.dotag.wa.gov.au/_files/juror_intimidation.pdf>. His Honour conceded that it was reasonable to infer that the letter was written by a juror in the trial and that it was likely to have been written before the verdict was handed down: at [35]–[36]. The Court suggested that its

inadmissible evidence in support of the appeal and the Court could not be satisfied that an irregularity had occurred. In addition, McLure P observed that to the extent that public policy seeks to protect jurors from coercion, it has not been expressed to include coercion from within the jury room.²⁶

The Questions

The status and scope of this rule has not been before the High Court before. State courts have considered it on numerous occasions, but the strength of precedent has defied a thorough review of its suitability for 21st-century criminal justice. It raises numerous questions. First, what is the scope of the jury secrecy rule? Coercion in the jury room, if proven, is in fact extrinsic to jury deliberation because it is not deliberative conduct. It would be a legal fiction to treat conduct antithetical to jury debate and discourse as ‘deliberation’. While the letter purports to explain a juror’s basis for joining the verdict (and so his or her *reason* for agreeing to the verdict), it does so by revealing conduct that should be viewed as outside a rule that protects jurors’ ‘deliberative conduct’. It does not protect their criminal or improper conduct, which is counter to a jury’s adjudicative role.

Second, this raises questions (which Martin CJ briefly traversed) regarding the difficulty of distinguishing between juror complaint of robust but stressful juror argumentation (which *is* protected from disclosure) and juror-to-juror threats, intimidation and coercion (which may be criminal in nature, or just highly inappropriate).

Third, does (or should) the common law rule permit exceptions, and if so, how are these exceptions to be defined? Clearly the public interest elements supporting the rule also mandate that any exceptions be clear.

Finally, with respect to the above questions, is this a matter for the High Court — or is it better resolved by the Parliaments of each State and Territory?

The fact that juror misconduct looms increasingly large in the law reports is an argument in favour of a robust review of these issues. The development and wide availability of the internet gives everyone speedy, private and ready access to information, some accurate and potentially pertinent, much neither accurate nor pertinent. Most importantly, juror accessing and reliance upon internet-based information breaches the juror oath to give a true verdict according to the evidence. So, there is a daunting depth and spread of common law precedent largely pitched against the appellant’s case and, upon any unravelling of the rule, the High Court has to resolve complex issues that go to the heart of contemporary criminal justice. Confirmation of the strict boundaries of the *Vaise* rule avoids complexity, but at what cost? It will mean, in this case, that a juror who may have been coerced in the jury room is not protected by the law. Nor is an accused protected where a juror acts corruptly, improperly or just foolishly in reaching his or her verdict on matters beyond the evidence or in a manner out of keeping with the jurors’ oath. Instead,

incomplete status and lack of stated authorship might support a view that the juror reconsidered his or her position: at [36].

²⁶ *Smith v Western Australia* [2013] WASCA 7 (17 January 2013) [53].

maintenance of jury secrecy retains the potential to protect not only a juror who has engaged in coercion, but also a verdict obtained by coercion. Mark Smith remains convicted (and on the sexual offender register) despite the apparent doubt of a juror.

The Rule

Lord Mansfield's rule in *Vaise v Delaval* stated that:

[a] court cannot receive ... an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanour; but in every such case the Court must derive their knowledge from some other source, such as some person having seen the transaction through a window or by some such other means.²⁷

A pithy summary of the modern appreciation of the rule is provided by Arbour J in the Canadian Supreme Court case of *R v Pan; R v Sawyer*. Her Honour observed that:

statements made, opinions expressed, arguments advanced and votes cast by members of a jury in the course of their deliberations are inadmissible in any legal proceedings. In particular, jurors may not testify about the effect of anything on their or other jurors' minds, emotions or ultimate decision. On the other hand, the common law rule does not render inadmissible evidence of facts, statements or events extrinsic to the deliberation process, whether originating from a juror or from a third party that may have tainted the verdict.²⁸

The factual circumstances of a communication or conduct have become pivotal. Some of the most challenging contexts where questions have arisen include claims of juror bigotry, racism or just plain laziness — preferring shortcuts, such as tossing a coin. The rule has arisen in various circumstances, including where:

- jurors have relied on information that was not evidence before the court, from juror sleuthing, which is extrinsic to deliberations,²⁹ from error, or because of third party information;³⁰

²⁷ *Vaise v Delaval* (1785) 99 ER 944.

²⁸ (2001) 200 DLR (4th) 577 [77].

²⁹ The fact that improper extrinsic influence has occurred will typically be sufficient to sustain an appeal without need to consider the actual impact of the inadmissible material: see, eg, *Skaf* (2004) 60 NSWLR 86 (two jurors made a location visit to where the crime allegedly occurred); *R v K* (2003) 59 NSWLR 431 (jurors retrieved internet-based material); in England: *R v Young* [1995] QB 324 (four jurors while sequestered overnight consulted the spirits of the deceased in a double murder prosecution); *R v Karakaya* [2005] 2 Cr App R 5 (internet searches); *R v Marshall and Crump* [2007] EWCA Crim 35 (internet searches); *R v Thakrar* [2008] EWCA Crim 2359 (internet searches); in New Zealand: *R v B* [2008] NZCA 130 (internet searches).

³⁰ *R v Wilton* (2013) 116 SASR 392 (juror obtained inadmissible information from member of public gallery); *R v Thompson* [2011] 1 WLR 200 [41] (a similar allegation); *R v Brandon* (1969) 53 Cr App R 466 (bailiff comments to juror); *R v Hood* [1968] 1 WLR 773 (juror acquainted with one of the witnesses and may have known of the appellant's record).

- jurors have decided by improper means, chiefly by tossing a coin, or similar³¹ — most infamously, by ouija board;³²
- jurors have (or may have) reached their verdict for improper reasons, such as racism;³³
- a juror has stated that he or she was coerced into agreeing with the verdict.³⁴
- jurors have mistaken a majority verdict for the requirement of ‘unanimity’,³⁵ and other forms of possible verdict error.³⁶

The rule has traditionally relied upon the invocation of a bright-line distinction between matters *intrinsic* to jury deliberations and matters *extrinsic* to them. If this line can be drawn without blur, the rule has the appearance of disarming simplicity. Evidence, even post-verdict evidence, of how or why jurors arrived at their verdict is clearly evidence intrinsic to deliberations.³⁷ The cases

³¹ *Vaise v Delaval* (1785) 99 ER 944 (tossing a coin); *Aylett v Jewel* (1779) 2 W Bl 1299 (CP) (lots drawn); see also *R v Thompson* [2011] 1 WLR 200 [81] (juror experimentation in the jury room); *R v Smith*; *R v Mercieca* [2005] 1 WLR 704 [18] (horse-trading over verdicts).

³² *R v Young* [1995] QB 324.

³³ *R v Mirza* [2004] 1 AC 1118 (racism); *R v Connor* [2004] 1 AC 1118 (juror letter after the verdict indicating that the jury believed only one of two convicted co-accused was guilty but that they should both be found guilty to ‘teach them a lesson, things in this life were not fair ... [as they were] young, the sentence would not be too severe ... [otherwise] we could be here for another week’. This was regarded by Lord Steyn as possibly to some extent the exaggerated protest of a disgruntled juror); *R v Qureshi* [2002] 1 WLR 518 (racism); *R v JC* [2013] EWCA Crim 368 (juror note, during trial, referring to prejudice against ‘travellers’. The defendants were travellers). European jurisprudence: *Gregory v United Kingdom* (1997) 25 EHRR 577 (racism); see also *Sander v United Kingdom* (2000) 31 EHRR 1003 (breach of *European Convention on Human Rights* art 6 upheld).

³⁴ *R v Thompson* [2011] 1 WLR 200 [35]; *R v Smith*; *R v Mercieca* [2005] 1 WLR 704 [11]: ‘during the deliberating process Jurors are being badgered, coerced and intimidated into changing their verdict to that which a certain group of Jurors deem to be the right verdict regardless of what the evidence shows. For example, certain jurors would sneer and pour scorn on another juror’s verdict by making comments such as: “The CPS would not have brought the case if they did not think that the defendants were guilty”; “Do you want a re-trial at the tax payers expense”; Accusing jurors of:— “Not having any common sense”; “Not looking at the evidence”; “Being afraid of finding the defendants guilty”’.

³⁵ See the confronting decision in *Nanan v The State* [1986] AC 860 (refusal by the Privy Council to admit evidence from the former jury foreperson that he thought ‘unanimous’ meant majority verdict and the jury had been in fact divided 8:4 on the guilt of Nanan (whose conviction made him subject to the death penalty).

³⁶ *R v Woodfall* [1770] EngR 66; (1770) 98 ER 398; *Ellis v Deheer* [1922] 2 KB 113 (jurors out of earshot of verdict, outside the rule, following *R v Wooller* (1817) 2 Stark 111); *R v Millward* [1999] 1 Cr App R 61 (letter from foreperson saying that she was mistaken in saying the verdict was unanimous).

³⁷ For example, the post-verdict observation by the foreman in *R v Herring* (Unreported, Court of Criminal Appeal, New South Wales, McInerny, Studdert and Simpson JJ, 24 November 1998) that ‘he had most of the female jurors on side’ was inadmissible (discussed in *Skaf* (2004) 60 NSWLR 86, 95 [224]–[225] (Mason P, Wood CJ at CL and Sully J)). In *Skaf* the reference in the foreman’s affidavit that indicated an element of the basis for his verdict was held to be admissible but it ‘comes close to the line’ and was not taken into account by the Court. The relevant paragraph stated: ‘I only went to the park to clarify something for my own mind ... I wanted to be sure my decision was not in any doubt before the verdict.’ In *R v Woolcott Forbes* (1944) SR(NSW) 333, 343, Jordan CJ accepted evidence of the lack of impact on a juror of an overture to bribe him (but this is

reveal that even determining what ‘jury deliberation’ means raises thorny issues: should it require *all* jurors to be present at all times? Should it encompass only conversations in the jury room? Should it embrace only appropriate deliberative behaviour (and what *is* this behaviour)? Presumptively, evidence of the content of discussion *inside* the jury room will be within deliberations (and vice versa),³⁸ but not always. Ultimately, admissibility comes down to whether discussion or conduct ‘may truly be described as deliberations by the jury’,³⁹ does not arise during a break from deliberations⁴⁰ or is not the result of an intrusion into deliberations.⁴¹

Timing

As *Smith*’s case illustrates, timing is particularly pertinent to concerns regarding finality of process. While a juror’s letter in the jury room prior to the delivery of the verdict (albeit found afterwards) does not fit neatly with cases of jurors dissenting at the time the verdict is handed down⁴² or with cases where jurors were absent at that stage,⁴³ neither is it the equivalent of post-verdict juror expressions of disagreement that raise concerns that their claim of deliberative irregularity is really more accurately one of subsequent rumination and regret.⁴⁴

Where an issue is brought to a trial judge’s attention while a trial is on foot, remedial action may be possible, either by judicial direction and instruction, by discharging an errant juror (or the whole jury), or by nipping a potential problem in the bud. As the New South Wales District Court case of *R v Wills*⁴⁵ demonstrates, modern judicial trial management is classically respectful of jurors and appreciative of modern social dynamics. *Wills* also illustrates the shades of investigation and of juror behaviour that may be in issue. In *Wills*, Judge Haesler responded to a report that the trial was ‘all over Facebook’ by ordering a preliminary Sheriff’s Office inquiry into the issue. His Honour ruled that the

probably inconsistent with the letter and spirit of the *Vaise* rule). The Court in *Skaf* observed that: ‘a statement by a juror as to the positive or negative impact of extraneous material upon his or her deliberative processes would be inadmissible in accordance with the rule of preclusion’: at 97 [233].

³⁸ ‘Note however that “deliberations” may take place outside the jury box or jury room and that they may occur when less than the whole number of jurors are present. For example, deliberations are not interrupted because a juror goes to the toilet. There will be matters of degree and the line may not always be easy to draw’: *Skaf* (2004) 60 NSWLR 86, 95 [224], and see generally 95–6 [222]–[228] (Mason P, Wood CJ at CL and Sully J); *Shrivastava* [2011] WASCA 8 (14 January 2011) [65].

³⁹ *Re Portillo* [1997] 2 VR 723, 726 (Callaway JA).

⁴⁰ *R v Young* [1995] QB 324.

⁴¹ For example, in *R v Glastonbury* (2012) 115 SASR 141, a juror and a sheriff’s officer had a conversation about the facts of the case in the jury room. This was held to be admissible as it was not part of jury deliberations. See also *R v Emmett*; *R v Masland* (1988) 14 NSWLR 327.

⁴² *R v Challenger* [1989] 2 Qd R 352 (the juror shook her head).

⁴³ *Ellis v Deheer* [1922] 2 KB 113, 120 (Atkin LJ) (jurors present, but not in earshot); *R v Wooller* (1817) 2 Stark 111; 171 ER 589 (jurors absent).

⁴⁴ See *Nanan v Trinidad and Tobago* [1986] 1 AC 860; *Nesbitt v Parrett* (1902) 18 TLC 510; *R v Roads* [1967] 2 QB 108; *R v Millward* [1999] 1 Cr App R 61, 65 (though noting the possibility of investigation ‘in quite extraordinary circumstances’). These also raise real issues about the adequacy of juror support to assist with the inevitable psychological pressures that come from this civic duty.

⁴⁵ [2012] NSWDC 285 (17 July 2012) (*Wills*’).

testimony of the Sheriff's officer revealed that a number of jurors were Facebook friends and that Facebook featured entries about the trial. However, the entries were merely to the type of trial, its likely length, its 'unusual nature' and that there were 'people in wigs and gowns' and a reference to the 'joy at having a weekend off'. There was also a photo-shopped picture of the juror dressed in a wig and gown. The investigations showed no breach of confidentiality had occurred. Judge Haesler ruled that further investigation (by examining the juror under oath himself) was undesirable because it might create an unwarranted juror perception of an attack on the integrity of the jurors that 'would then be worse than the problem sought to be cured'.

Wills is a single illustration, but is revelatory of a major change in social dynamics and judge/jury relationships compared to earlier times (discussed below). This judge astutely recognised the potential for chill or distortion by a hair-trigger approach to potentially invasive juror questioning. As we see below, this contrasts markedly from the judicial mindset in times past.

II Reasons to Maintain a Strict Rule?

Precedent

It is clear that history and precedent are important to understanding the non-negotiable essence of the jury trial in Australia.⁴⁶ But, although Lord Mansfield's judgment in *Vaise v Delaval*⁴⁷ is generally accepted as defining the beginning of the jury secrecy rule in English common law, precedent with respect to jury confidentiality has in fact been a moving feast. Notably, it does not reveal a single thread of consensus going back to the mists of common law time. It has been suggested⁴⁸ that the rule may predate the modern jury, coming from a time when courts sought 'divine' judgment, and trials were resolved by parties pleading to the highest authority. The rule reflected that second-guessing the supernatural was neither necessary nor appropriate.

There are more compelling and prosaic theories of the origins of juror deliberation secrecy. Before moving to them, it is worth noting that although some historical elements of jury functioning, such as unanimity, epitomise the essence of jury trials, others, such as 'praying the tales' and *jury de medietate linguae*,⁴⁹ reflect bygone times only. So, terms like 'sanctity of the jury room' may imply a link to divine notions of justice, but they merely represent the glacial pace of change where concepts linger long after their contemporary utility has expired.⁵⁰

⁴⁶ See, eg, *Cheatle v The Queen* (1993) 177 CLR 541, 549.

⁴⁷ (1785) 1 TR 11 (KB). See text above accompanying n 27 above.

⁴⁸ Dorne Boniface, 'Juror Misconduct, Secret Jury Business and the Exclusionary Rule' (2008) 32 *Criminal Law Journal* 18, 24. For the history of the criminal trial and the evolution of the jury, see Jill Hunter and Kathryn Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (Butterworths, 1995) chs 1, 3.

⁴⁹ *Juries Act 1927* (SA) s 85: 'No alien is entitled to be tried by a jury one-half of which consists of aliens' (headed, '*Jury de medietate linguae* abolished').

⁵⁰ See, eg, *Juries Act 1957* (WA) ss 52, 55(3), regarding the right of a party to 'pray a tales' (ie, to call upon passers-by (a talesman) to make up the numbers for jury service when a trial is called on

As Stone observed, the ‘jury as a rational mode of inquiry into the facts did not burst all at once upon the English mind’.⁵¹ Nor has its evolution been through bursts of momentous changes.

The modern jury began to take identifiable shape by the mid-14th century,⁵² more than 650 years ago. Even the mode of jury determination Stone describes as ‘modern’ (that is, as a group of men who weighed parties’ evidence to establish whether the prosecution has discharged its burden) refers to a remarkably different institution from today’s jury. Trials still needed to develop from merely determining the requisite criminal facts into the accusatorial trials we recognise today where the prosecution’s burden is to prove its case beyond reasonable doubt. In addition, the representative grundnorm of yesteryear, when gender and property requirements played roles, has obviously disappeared. There are even more prominent changes. Until at least the late 18th century, criminal juries sat on multiple trials, sometimes from early in the morning until late at night.⁵³ They reached verdict in minutes, generally without needing to retire from the courtroom. That the administration of criminal justice had elements of callousness and disdain toward the ‘lower orders’ explained the pervasive view that criminal trials were ‘a necessary evil that could be hurried along, unlike civil business’.⁵⁴ Adjournment in criminal (but not civil) trials was prohibited until 1794, ostensibly to protect from jury tampering but, according to Langbein,⁵⁵ its effect was to hasten deliberations.

Into the late 18th century, jurors could still ask questions of witnesses,⁵⁶ but *Bushell’s Case* in 1670⁵⁷ had revealed the significance of judicial control over jury verdicts. Even after *Bushell’s Case*, judges could fine jurors who misbehaved and failed to act on their ‘conscience’.⁵⁸ While *Bushell’s Case* drew a line in the sand with respect to jury autonomy, it was a blurry one and it did not mark the cessation of judicial power over juries’ decision-making. At least until 1718, judges could abort a trial they thought was heading towards an inappropriate conclusion (presumably on the judge’s assessment of the evidence) and have it heard by a new jury. Well beyond the 17th century and at least until the late 18th century, a trial

should the jury pool be inadequate). This process is typically extinct in modern well-resourced court administration where jurors are summonsed through the electoral roll. Cf Louis Andrews, ‘Unsuspecting Passer-By Shanghaied for Jury Duty’, *Canberra Times* (online), 8 March 2012 <<http://www.canberratimes.com.au/act-news/unsuspecting-passerby-shanghaied-for-jury-duty-20120307-1ukx8.html#ixzz2kTJ5BvRs>>.

⁵¹ Julius Stone (ed W A N Wells), *Evidence: Its History and Policies* (Butterworths, 1991) 16.

⁵² *Ibid* 11. For Stone the year 1350 marks the beginning of the trial jury ‘as a rational mode of discovering the truth [taking] ... substantially its modern place in our law of evidence and procedure’. From this time the jury was no longer an administrative investigatory body serving the old ‘irrational’ modes of proof nor was it the same body accusing as well as judging.

⁵³ John H Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2003) 24.

⁵⁴ *Ibid* 25.

⁵⁵ *Ibid* 23. See also ‘Unanimity of the Jury’ (1832) VIII *The Law Magazine* Art II, 44–66, detailing the pervasiveness of juror coercion and intimidation arising from juries being kept without food for long hours until they had reached unanimity.

⁵⁶ The timing of their questions was the only matter open to dispute: see Langbein, above n 53, 320.

⁵⁷ (1670) 124 ER 1006 (KB).

⁵⁸ Langbein, above n 53, 324, fn 346. Langbein also notes a judge in 1754 fining a juror £50 for departing the court early.

judge could replace a conviction with a pardon or commute the prisoner's sentence.⁵⁹ Judges could require redeliberation by a jury that delivered what the judge considered a mistaken verdict. However, judges utilised the judicial carrot as well as the stick. In the late 17th century, Matthew Hale had described the judge's role in assisting juries by 'weighing the evidence before them, and observing where the question and knot of the business lies, and ... showing them his opinion even in matter of fact' observing that it was 'a great advantage and light to lay men'.⁶⁰ Hand in hand with the judge's power to require further jury deliberation was the judicial power to question jurors so that a judge could explain where jurors had erred, for the benefit of their revised consideration of the verdict. According to Langbein,⁶¹ this conversation between jury and judge regarding the jury's verdict continued well into the late 18th and early 19th centuries. But by this time, lawyers' increasing dominance in criminal trials was beginning to clip judges' and jurors' wings,⁶² reshaping the inquisitorial aspects of trial process into the accusatorial trial we see today.

As the active judicial oversight of jury verdicts ended, a new repertoire of techniques to control juries emerged — rules of evidence. The rise of adversarialism and accusatorial principles, the retreat of active judicial control of the jury, and the emergence of defining traces of the modern law of evidence, all dating from the late 18th century, are not coincidental occurrences. 'Most of the nineteenth century would be needed to put the new law of jury control [the law of evidence] in place'⁶³ confirming that it is also no coincidence that Thayer stamped the law of evidence 'as the child of the jury system'.⁶⁴

The common law pedigree of Lord Mansfield's rule in *Vaise v Delaval*⁶⁵ was a matter that greatly exercised Wigmore. According to Wigmore, Lord Mansfield engaged in blatant judicial invention. In support, he lists nearly a dozen cases spread evenly from 1590 to 1779 where jurors' evidence of deliberations was received (or it is made clear that it could have been received).⁶⁶ On some occasions, preference was expressed for juror evidence over hearsay non-juror

⁵⁹ Described by Langbein as 'judicial manipulation of the royal pardon power': see above n 53, 325.

⁶⁰ Langbein, above n 53, 322, quoting from Matthew Hale (ed Charles M Gray), *The History of the Common Law of England* (1st ed, 1713, University of Chicago Press, 1971).

⁶¹ Langbein, above n 53, 322–3, 329. Even in the 1922 edition of Archbold, it is noted that a judge is not bound to accept the first verdict of the jury (unless it insists on it being recorded): Sir John Jervis, *Archbold's Pleading, Evidence and Practice in Criminal Cases* (Sweet & Maxwell, 26th ed, 1922) 219.

⁶² Langbein, above n 53, 321.

⁶³ Ibid 330, adding that 'the "chief ingredients were tightened control over the proof procedure (the law of evidence), increased stress on precision in legal guidelines (the law of jury instructions), and increased control over the relationship between evidence and verdicts (directed verdicts and new trial orders)''': quoting from Stephen C Yeazell, 'The Misunderstood Consequences of Modern Civil Process' (1994) *Wisconsin Law Review* 631, 642.

⁶⁴ J Thayer, *Preliminary Treatise on Evidence* (Rothman Reprints, 1898) 266.

⁶⁵ *Vaise v Delaval* (1785) 99 ER 944.

⁶⁶ '[W]ithin half a decade of ... *Vaise v Delaval*, the unquestioned practice had been to receive jurors' testimony ... without scruple ... [and] proof of [misconduct] ... was received equally from jurors and others, without discrimination': Wigmore, above n 7, 684.

evidence.⁶⁷ For example, the last case cited by Wigmore, *Aylett v Jewel*,⁶⁸ predated *Vaise v Delaval* by six years. In it, the court ruled that the affidavit evidence from an attorney that the jury had determined its verdict by lot (that is, lottery)⁶⁹ was insufficient to quash the verdict ‘there being no affidavit by the jurymen, or any other that was cognisant of this transaction, but merely this hearsay affidavit’.⁷⁰

Lord Mansfield’s words, quoted above,⁷¹ indicate that the jury secrecy rule was not intended to prevent suspect verdicts from being reviewed. Lord Mansfield’s policy rationale, described in *Owen v Warburton*,⁷² had two dimensions. First was the concern that a juror with a partisan interest in the trial might, through frustration with fellow jurors’ unwillingness to adopt his preferred verdict, suggest to them that they reach their verdict by lot. The juror would then be well-placed to quash the verdict by outing the improperly-determined verdict. Similarly, as is clear from the judgment of Sergeant Atcherley in *Straker v Graham*,⁷³ the other basis related to preventing a juror-witness from incriminating himself.⁷⁴ Wigmore’s thesis that ‘the prestige of the great Chief Justice’,⁷⁵ not precedent, caused *Vaise v Delaval* to prevail is persuasive. Further, it is notably consistent with history and with the dynamics of criminal jury trials at the time, that Lord Mansfield utilised jury secrecy not to reinforce the sanctity of jury decision-making, but quite the opposite, as an additional mechanism for controlling the jury. By 1922⁷⁶ the English case of *Ellis v Deheer* shows that the rule’s rationale had shifted:

⁶⁷ Wigmore, above n 7, 684. For example, in *Dent v Hertford Hundred* (1696) 2 Salk 645 an affidavit from the foreman stating ‘the plaintiff should never have a verdict whatever witnesses he produced’ was admitted to overturn the verdict.

⁶⁸ (1779) 2 W Bl 1299 (CP).

⁶⁹ Jury determination by lottery in lieu of adjudication appears regularly in case law from this period preceding Lord Mansfield’s judgment in *Vaise v Delaval* (1785) 99 ER 944.

⁷⁰ Wigmore, above n 7, 684.

⁷¹ See text accompanying n 27 above.

⁷² (1807) 1 B&P NR 326, cited by Wigmore, above n 7, 685: ‘It is singular indeed that almost the only evidence of which the case admits should be shut out; but considering the arts which might be used if a contrary ruling were to prevail, we think it is necessary to exclude such evidence. If it were understood to be the law that a juryman might set aside a verdict by such evidence, it might sometimes happen that a juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him’ (Lord Mansfield). Similarly, Wigmore notes that concern for ‘fraud and abuse’ was the reason Baron Parkes’ concurred with the rule in *Owen v Warburton* (1807) 1 B&P NR 326.

⁷³ (1839) 4 M&W 721. See Wigmore, above n 7, 685. These concerns are also represented in the United States’ case of *Cluggage v Swan* (1811) 4 Binn 150, 155 per Yeates J, referring to ‘the most pernicious arts, and tampering with jurors’ and the danger of ‘entrapping the jurors’ by exposing them to proceedings relating to their criminality: Wigmore, above n 7, 686.

⁷⁴ Witness privilege is discussed by Langbein, above n 53, 281–2 and Wigmore, above n 7, 683. Stone, above n 51, 26, 600, offers alternative rationales for the jury secrecy rule: first, the parol evidence rule (originating from ‘trial by charter’ whereby the document proved a litigant’s claim, neither requiring nor permitting inquiry beyond proof of the document), and then as an extension of an adjudicator’s privilege.

⁷⁵ Wigmore, above n 7, 685, citing *Owen v Warburton* (1807) 1 B&P NR 326; *Straker v Graham* (1839) 7 Dowl Pr 223, 4 M&W 721; *Burgess v Langley* (1843) 5 M&Gr 722.

⁷⁶ According to Wigmore, above n 7, 683–4, the rule ‘thrived — apparently because new supposed reasons of policy were found, which buoyed Lord Mansfield’s rule’ despite the general repudiation of the witness privilege.

[O]n the one hand it is in order to secure the finality of decisions arrived at by the jury, and on the other to protect the jurymen themselves and prevent their being exposed to pressure to explain the reasons which actuated them in arriving at their verdict. To my mind it is a principle which it is of the highest importance in the interests of justice to maintain, and an infringement of the rule appears to me a very serious interference with the administration of justice.⁷⁷

Finality

Obviously, finality of process is not a major consideration when a presiding judge has an opportunity to address potential irregularities. After the key moment when a verdict is delivered in open court, finality becomes a consideration. Finality of process is important for litigants and for the public administration of justice. Current appeal processes are integral to the maintenance of the integrity of our criminal justice system. They reflect that finality in modern justice systems is merely a goal, not an obligation. Arguably, the systemised provisioning of criminal appeals represents one of the most important 20th-century reforms in criminal justice. Appellate review processes acknowledge the potential for human error to create an unfair trial. Therefore, the tenacity of the *Vaise* rule begs the question of why juror error is not more adequately embraced within the criminal appeal structure.

Confidentiality, Deliberative Freedom, and Freedom from Recriminations

The role of the secrecy rule in promoting candour and full and frank debate in the collegial and dynamic deliberative process in which juries are required to engage is described by Arbour J in the Canadian Supreme Court case of *R v Pan; R v Sawyer*:

While searching for unanimity, jurors should be free to explore out loud all avenues of reasoning without fear of exposure to public ridicule, contempt or hatred. This rationale is of vital importance to the potential acquittal of an unpopular accused, or one charged with a particularly repulsive crime.⁷⁸

There is strong public interest in protecting jurors in the way described by Arbour J. But — like the modern day incursions into the marital privilege and the exceptions to client legal privilege, protected confidences, religious confessions, the privilege against self-incrimination, public interest immunity, and settlement negotiations — respect for the virtue in the rule does not dictate that it never permit exceptions.⁷⁹ Further, Australian jurors are typically on notice that their behaviour may be subject to scrutiny because it is common practice for trial judges to indicate to jurors that they should inform upon any of their number if impropriety or irregularity occurs to enable any problem to be addressed.⁸⁰ And as cases such as

⁷⁷ [1922] 2 KB 113, 121 (CA) (Atkin LJ).

⁷⁸ [2001] 2 SCR 344, 373 [50].

⁷⁹ Regarding these privileges, see n 98 below.

⁸⁰ See, eg, Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, [1-490]: ‘Reporting other misconduct and irregularities — s 75C Jury Act’ catering for ‘the refusal of a juror to take part in the jury’s deliberations, or a juror’s lack of capacity to take part in the trial (including

the New South Wales case of *Skaf*⁸¹ indicate, formal enquiry that brushes close to (and in that case across into) matters intrinsic to a juror's reason for his or her verdict, can still take place while ensuring a juror's identity — in that case, Juror 3074295 — remains anonymous. This scrutiny of jurors' reasons for their verdict does not, of itself, breach juror anonymity. It is a prominent feature of Australian jury administration that jurors are protected systematically and robustly, through professional court administration security services and statutory provisions that criminalise inappropriate intrusions, from loss of anonymity.⁸² If (as is the case) all Australian courts permit some enquiry into matters intrinsic to jury deliberations on the basis that it relates to certain prosecutions, is it defensible to prevent an accused from being able to rely on enquiry where there is evidence of an irregularity that raises doubts of a fair trial?

Further, if shielding juries from public criticism is so critical, why is the protection not comprehensive? Why not protect juries from 'public ridicule, contempt or hatred'⁸³ of the kind visited upon the Victoria Pryce jury in early 2013?⁸⁴ In this English case, the trial judge, as well as the media, commented negatively on the jury's conduct. They were provoked by 10 questions that the jury submitted to the trial judge. The judge was reported as saying that 'he had never in his 30-year legal career come across a situation where jurors expressed bafflement about such key issues of a case so late in a trial' and that he 'lamented the jury's "fundamental deficits of understanding" as they were discharged for failing to reach a verdict'.⁸⁵ It was also reported that the prosecutor had said 'the jurors had shown an "unparalleled" failure to understand "very basic concepts of jury trials"'.⁸⁶ These comments fanned public and media debate with newspaper headlines such as 'Do we need IQ TESTS for juries? Vicky Pryce trial has exposed a breathtaking level of ignorance and stupidity'.⁸⁷ Media described this exchange,

an inability to speak or comprehend English), or any misconduct as a juror, or a juror's inability to be impartial because of the juror's familiarity with the witnesses or legal representatives in the trial, or a juror becoming disqualified from serving, or being ineligible to serve, as a juror'.

⁸¹ (2004) 60 NSWLR 86.

⁸² *Juries Act 1957* (WA) s 34. On the subject of anonymity, cf the United States' case of *Safeco Insurance Company of Illinois v Southern Farm Bureau Casualty Insurance Co*, 2013 Ark. App. 696, where the Court of Appeals applied the Arkansas Rule of Evidence 606(b), which is consistent with the *Vaise* rule. The case involved an internet search by a juror who reported her research findings to the jury. The Court found no prejudice, noting that one juror's name is included in the judgment, but 'the names of the jurors whose votes were allegedly altered upon learning of the internet definition of an intentional act are unknown. Therefore, it is sheer speculation on the part of Davidson [the juror] to state that the jurors who "voted in favor of [Farm Bureau]" relied on the internet definition'.

⁸³ *R v Pan; R v Sawyer* [2001] 2 SCR 344, 373 [50].

⁸⁴ Paul Peachey, 'Vicky Pryce Trial: Q: "Can a Juror Come to a Verdict Based on a Reason that was Not Presented in Court and Has no Facts or Evidence to Support It?"', *The Independent* (online), 21 February 2013: <<http://www.independent.co.uk/news/uk/crime/vicky-pryce-trial-q-can-a-juror-come-to-a-verdict-based-on-a-reason-that-was-not-presented-in-court-and-has-no-facts-or-evidence-to-support-it-8503566.html>>.

⁸⁵ *Ibid.*

⁸⁶ Victoria Coren, 'My Verdict on Our Justice System', *The Guardian* (online), 24 February 2013 <<http://www.theguardian.com/commentisfree/2013/feb/24/vicky-pryce-jury-system>>.

⁸⁷ Melanie Phillips, 'Do We Need IQ Tests for Juries? Vicky Pryce Trial Has Exposed a Breathtaking Level of Ignorance and Stupidity', *Mail Online* (online), 20 February 2013 <<http://www.dailymail.co.uk/news/article-2282001/Do-need-IQ-TESTS-juries-Vicky-Pryce-trial->

saying that the judge ‘effectively threw up his hands in despair’, that the questions were ‘perplexing’ and ‘most extraordinary’ and that one ‘revealed a fundamental lack of understanding of what a criminal trial actually is’,⁸⁸ and that the trial judge ‘deserves credit for amusing the nation’ with one of his answers.⁸⁹ It is a notable incident because the jurors were conscientious enough to pose questions that were concerning some of them and to deliberate for 14 hours without agreement before accepting that they could not deliver a verdict. As an illustration of cultural variations, consider the United States, where ex-jurors regularly participate in media discussions and — perhaps the most intense public gaping upon jury deliberations — jury deliberations may be televised.⁹⁰

This media circus illustrates the importance of protecting jurors, but it also shows that the secrecy rule is a poor mask for juries, compounded by the fact that it runs the risk of being open to the accusation that it is a rule rigorously ‘maintained for fear that letting in daylight upon magic would reveal the jury as an unjust and irrational institution’.⁹¹

III Adopting a Rule with Exceptions

Exceptions

Public policy underpinning the very existence of jury trials dictates that the jury secrecy rule be scrutinised closely. First, s 80 of the *Australian Constitution* ‘was inserted for the benefit of the accused’⁹² as a “safeguard against the corrupt or over-zealous prosecutor and against the compliant, biased, or eccentric judge”.⁹³ Second, as Gageler J has noted, procedural fairness ‘requires, at the very least, the adoption of procedures that ensure to a person whose right or legally protected interest may finally be altered or determined by a court order a fair opportunity to respond to evidence on which that order might be based’.⁹⁴ Third, the status quo

exposed-breathhtaking-level-ignorance-stupidity.html>. See also ‘Vicky Pryce Jurors — Were They Stupid or Just Confused?’, *The Week* (online), 21 February 2013 <<http://www.theweek.co.uk/uk-news/51625/vicky-pryce-jurors-%E2%80%93-were-they-stupid-or-just-confused>> (Reader comments include: ‘now a jury with the apparent IQ of a dead trout’.)

⁸⁸ Phillips, above n 87.

⁸⁹ Coren, above n 86.

⁹⁰ See Clifford Holt Ruprecht, ‘Are Verdicts, Too, Like Sausages?: Lifting the Cloak of Jury Secrecy’ (1997–98) 146 *University of Pennsylvania Law Review* 217, 224–41.

⁹¹ Or, as implied by Penny Darbyshire, for the law to hide behind for other reasons, referring to the reliance by Lane LCJ on the rule for non-interference with the jury’s verdict in the 1987 appeal of the Birmingham Six: Penny Darbyshire, ‘The Lamp that Shows that Freedom Lives — Is It Worth the Candle?’ (1991) *Criminal Law Review* 740, 751. See also *R v Mirza; R v Connor* [2004] 1 AC 1118 [159] (Lord Rodger). See also Ruprecht, above n 90, 217 where the author indicates that the title of his article is taken from a quote attributed to Otto von Bismarck: ‘If you like laws and sausages, you should never watch either one being made.’

⁹² *Brown v The Queen* (1986) 160 CLR 171, 182 (Gibbs CJ).

⁹³ *Ibid* 179 (Gibbs CJ), citing *Duncan v Louisiana* (1968) 391 US 145, 500.

⁹⁴ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458, 499 [188] (citations omitted). (And, it is pertinent to add, a fair opportunity to respond to *the process* upon which a decision has been reached as well as the evidence.)

with respect to jury security and the reach of the rule⁹⁵ reinforces the conclusion that the *Vaise* rule is seriously dated.

Fourth, revisiting common law rules and principles is intrinsic to the common law method. The common law has in-built ability to move with the times, across locations, into diverse cultures and contexts, and to adjust to contemporary societal values and needs. With respect to the *Vaise* rule, the common law needs to end its hide-bound status and become neither a captive of the past, nor a hostage to the legislature. Instead, the common law should reflect the fundamental principles of accusatorial justice.⁹⁶ The jury secrecy rule has not been static (despite the apparent gloss of precedent). Its rationales and boundaries have evolved over time. As early as 1832, exceptions to the rule were envisaged in that reference was made to it applying in ‘nine hundred and ninety nine cases out of a thousand’.⁹⁷ The 20th century moved to favour rigidity. Now, as we see below, modern English precedent shows signs of acknowledging the importance and need to investigate allegations regarding jury deliberations and jurors’ obligations to their oath. England, like Scotland, is aided in the execution of these matters by the investigatory body, the Criminal Cases Review Commission. Finally, there is an overwhelming case for broad consistency with the modern treatment of other confidential communication contexts. In no situation are they inviolable.⁹⁸

IV Conclusions

‘Is jury privacy to be valued so highly that it is to be maintained at all costs?’⁹⁹

It is clear that respect for jury privacy should be prized. The questions are: how and how much? There is a strong presumption that juries act with impartiality and in accordance with their instructions. But if there is prima facie evidence of an

⁹⁵ That is, the imperfect scope of the rule in protecting juries in all contexts from censure and ridicule (illustrated by the English Victoria Pryce trial); the legislated exceptions permitting the divulging of jury deliberations for prosecution and academic research purposes; and the extensive court administration-based jury security systems.

⁹⁶ Michael McHugh, ‘The Law-Making Function of the Judicial Process (Parts I and II)’ (1988) 62 *Australian Law Journal* 15, 116; Michael Kirby, ‘In Praise of Common Law Renewal’ (1992) 15 *University of New South Wales Law Journal* 462, 470, suggesting *Donoghue v Stevenson* [1932] AC 562 and *R v McKinney and Judge* (1991) 171 CLR 468 as illustrations: at 473–4. See also *R v L* (1991) 174 CLR 379; *R v R* [1992] 1 AC 599.

⁹⁷ See ‘Unanimity of the Jury’, above n 55.

⁹⁸ See, eg, *Uniform Evidence Acts* s 18 (compellability of spouses and others, subject to a balancing test), s 125 (client legal privilege can be lost due to fraud, deliberate abuse of power etc), s 126B (protected confidences, lost subject to a balancing of interests test, see sub-ss (3) and (4)), s 126D (confidential relationship privilege lost due to fraud etc), s 126K (journalists’ sources, lost according to a balancing of interests test), s 127 (religious confessions, privilege lost if the communication ‘was made for a criminal purpose’, otherwise it is excluded from court even if the rules of evidence do not apply in the court or tribunal in question), ss 128, 128A (privilege against self-incrimination, subject to mechanisms to protect a witness’s rights), s 130 (matters of state, public interest immunity subject to a balancing of interests test) — see also *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 — s 131 (settlement negotiations, various exceptions, see sub-s (2)).

⁹⁹ Campbell, above n 8, 200.

irregularity, determining whether an accused has (or will) receive a fair trial is paramount.

Change: the High Court or the Parliaments?

Law is a social instrument — a means, not an end. As society changes, so must the instruments which regulate it. The unprecedented rate of change in Australian society in recent years has meant that many of the rules of law and, indeed, the wider principles that lie at the back of them are unjust or inefficient. Moreover, rapid change means that conflicts arising from novel situations and which call for adjustment by the judicial process are often not covered by the existing rules ... Since it is virtually impossible for legislatures to devote sufficient sitting time to the continual reform of the law, particularly in those areas of law regulating the mutual rights and duties of citizens, the role must be filled by other institutions including the courts.¹⁰⁰

The national interest in the maintenance of integrity in jury trials means that the High Court is well placed to act with respect to the issues at hand. Further, it is aided by signs (albeit slightly ambivalent ones) of a steady attitudinal shift in English decisions. Most recently, Judge LCJ, in the 2011 Court of Appeal omnibus appeal case of *R v Thompson* observed that the *Vaise* rule permits two ‘narrow exceptions’:

The first arises if it emerges that there may have been a complete repudiation of the oath taken by the jurors to try the case according to the evidence; examples include a decision arrived at by the casting of lots or the toss of a coin, or the well-known case of the use, or rather misuse, of an Ouija board. If there are serious grounds for believing that such a repudiation may have taken place, this court will inquire into it, and may hear, *de bene esse*, evidence, including the evidence of jurors themselves, in order to decide whether it has happened. If it has, the verdict will inevitably be unsafe, and any resulting conviction will be quashed.¹⁰¹

The second exception is described by Judge LCJ, by reference to ‘where extraneous material has been introduced into the jury deliberations’. This takes the category of extrinsic influence (that is of course, outside the rule), into the classic domain of the secrecy rule, namely:

telephone calls into or out of the jury room, papers mistakenly included in the jury bundle, discussions between jurors and relatives or friends about the case, and in recent years, information derived by one or more jurors from the internet.¹⁰²

Described by Judge LCJ as ‘familiar territory’ needing ‘no citation of authority’ it is subject to potential scrutiny because:

¹⁰⁰ Michael McHugh, ‘The Law-Making Function of the Judicial Process — Part II (1988) 62 *Australian Law Journal* 116.

¹⁰¹ [2011] 1 WLR 200 [4]. This replicates the exceptions described by Lord Hope of Craighead in *R v Mirza* [2004] 1 AC 1118 [123] (and quoted by Lord Carswell in *R v Smith; R v Mercieca* [2005] 1 WLR 704 [16] that such conduct ‘would be a negation of the function of a jury and a trial whose result was determined in such a manner would not be a trial at all’.

¹⁰² *R v Thompson* [2011] 1 WLR 200 [5].

[the] verdict must be reached, according to the jury oath, in accordance with the evidence. ... Where the complaint is made that the jury has considered non-evidential material, the court is entitled to examine the evidence (possibly after investigation by the Criminal Cases Review Commission) to ascertain the facts. If extraneous material has been introduced into the decision making process, the conviction may be quashed.¹⁰³

The *Smith v Western Australia* appeal is timely. It is also an appropriate platform. It is true that the juror's letter might have been clearer, but because it reveals 'possibility (real and not remote), [and albeit] not probability'¹⁰⁴ that there *might* have been a departure from due process that threatens the integrity of the judicial system it demands appellate remedy. This standard for addressing the possibility of adjudicative bias¹⁰⁵ should also apply to the *process* of jury decision-making. Lord Steyn's observation¹⁰⁶ that '[w]e shall never know' what happened in the jury room goes to the heart of why the status quo serves the law badly. Mystery and a black box theory of justice may have suited bygone eras, but where a real possibility of serious irregularity is evident, it becomes anachronistic for the simple reason that it smacks of justice in the dark.

Whether the High Court expands upon the approach indicated in *R v Thompson*, or fashions its own, it should continue to utilise its preference for overarching criminal justice principles, rather than relying upon categories of either conduct or context¹⁰⁷ as its benchmark.

¹⁰³ [2011] 1 WLR 200 [5], relying on *R v Blackwell* [1995] 2 Cr App R 625 and *R v Oke* [1997] Crim LR 898.

¹⁰⁴ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [7].

¹⁰⁵ *Ibid.*

¹⁰⁶ *R v Mirza; R v Connor* [2004] 1 AC 1118 [12] (Lord Steyn, dissenting).

¹⁰⁷ *Hargraves v The Queen* (2011) 245 CLR 257 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).