A light that never goes out?

Examining criticisms of trial by jury in criminal cases

Andrew Mitchell considers whether juries in criminal cases deserve our support.

Simon Jenkins, a journalist and commentator for The Times newspaper, consistently argues for the abolition of trial by jury for serious criminal cases. In February 2006, he introduced an article on the subject in the Sunday Times with the following words:

Jury trial has outlived its usefulness. To pretend that it delivers justice is absurd. This archaic theme park democracy is expensive, a waste of time and adds nothing to fair trial. Abolish it.

While legal academics are generally more cautious about calling for the abolition of jury trials, the late Professor Sir John Smith suggested that trial by jury would be exposed as deficient by serious academic scrutiny; and Penny Darbyshire, Reader in Law at Kingston University and an authority on the English legal system, argues that attachment to the idea of trial by jury in criminal cases is sentimental rather than practical.

This article examines some of the key criticisms relating to trial by jury in criminal cases, placing these in the context of recent attempts at jury reform and assessing the future for this method of hearing serious criminal cases.

Exam focus

This article is relevant for OCR AS Unit 1: The English Legal System, AQA AS Unit 2: Dispute Solving, and WJEC: Machinery of Justice.

Jury trials: a recent history

Peter Thornton QC, in an article for the 2004 Criminal Law Review on the last 50 years of trial by jury, points out that by the 1950s, jury trials had clear support from reforming bodies and academics. He cites the view of Humphreys J, in a journal article of 1956, expressing disbelief that 'there were any persons other than the inmates of a lunatic asylum who would vote in favour of the abolition of trial by jury in serious criminal cases'. We know also that this was the year that Lord Devlin declared trial by jury to be 'the lamp that shows that freedom lives'. By comparison, today some academics and politicians seem much less comfortable with trial by jury, and arguments for abolition or reform are not uncommon. Why might this be the case? One reason could be the extent to which juries have been under the political spotlight in recent times.

While most governments since the 1950s have tinkered with the practicalities of jury trials — providing for majority verdicts (1967), removing the property requirements for jury selection (1972), downgrading some triable-either-way offences to summary status (1980), ensuring the secrecy of jury deliberations through the Contempt of Court Act 1981 and introducing procedural safeguards as to the admissibility of police evidence (1984) — none has gone so far with jury reforms as the New Labour governments from 1997 to the present. The first battle between a Blair government and defenders of juries (including the Bar Council and the Law Society) occurred when the government attempted
to remove the defendant’s right to elect jury trial for cases concerning triable-either-way offences (a proposal with its origin in the Royal Commission on Criminal Justice report of 1993). The government’s two attempts at enacting this proposal — in the Criminal Justice (Mode of Trial) Bill 1999 and the Criminal Justice (Mode of Trial) No. 2 Bill 2000 — both met with such fierce resistance in the House of Commons and, significantly, in the House of Lords, that the government eventually dropped it.

However, this experience did not dissuade a further Blair government from seeking more substantial jury reforms in its Criminal Justice Act 2003, which drew selectively from the Auld Review (2001) and other law reform reports, such as the Roskill Committee on Fraud Trials (1986). Although it suffered a rocky ride through Parliament, the Criminal Justice Act 2003 was sufficiently intact to provide for:

- the abolition of juries in trials relating to serious fraud cases (at s.43, subject to further legislation, which has led the government to introduce the Fraud (Trials without a Jury) Bill to Parliament; see www.publications.parliament.uk/pa/pbills/200607/fraud_trials_without_a_jury.htm)
- the abolition of juries in trials where a danger of jury tampering can be identified (at s.44)

The government’s enthusiasm for trial by judge alone extended to a provision that defendants with the right to trial by jury in a case tried on indictment could opt instead for trial by judge alone, though this was heavily opposed and did not make its way through the parliamentary process. The Criminal Justice Act 2003 also, among other things, amended s.1 of the Juries Act 1974 by reforming the rules as to eligibility for jury selection, thus widening the pool of potential jurors.

It is clear, therefore, that trial by jury in criminal cases has been subject to a great deal of reform in recent years. As Peter Thornton QC argues, in light of the abolition of juries in two circumstances in the Criminal Justice Act 2003, it is now ‘seriously under threat’. On what further grounds, however, can it now be attacked?

What is wrong with trial by jury?
There are three recurring themes of criticism, which will be considered in turn.

Amateurism and jury composition
The media portrayal of jurors tends to reinforce the fear of dangerous amateurism. Think of the juror stereotype in Sidney Lumet’s great US law film Twelve Angry Men (1957) who will vote any way the majority votes so that the deliberations will end quickly and he can catch the latest baseball game; or, conversely, the juror in the Tony Hancock UK comedy series version (1959), played memorably by Sid James, who wishes to drag out proceedings because his expenses for jury service are more than he would make in an average week’s pay. Research undertaken by Darbyshire, Maughan and Stewart for the Auld Review (2001) indicates that age, gender, race, socioeconomic status, personality and life experience are factors that may influence juror decisions. Moreover, Simon Jenkins adds the point that jurors can be ‘taken in’ by experts and smooth-talking lawyers, and ‘bamboozled’ by court custom and practice. Researchers in Australia recently discovered that jurors in sexual assault trials showed an alarming degree of confusion as to the verdicts they had delivered (see The Times, 3 January 2007).

There are a number of responses to these charges. Jurors are selected randomly from those citizens aged 18–70, and ordinarily resident in the UK, listed on the electoral register. Only those with mental disorders, those on bail in criminal proceedings and those who have been subject to serious criminal penalties in the past are barred from selection. Therefore, people from all walks of life and all backgrounds are eligible to undertake this period of public service. This principle accords with the ‘right to a fair trial’ requirements of Article 6 of the European Convention on Human Rights.

While all jurors may be perceived as ‘amateurs’, William Young, writing in the Criminal Law Review (2003), points to another research finding of Darbyshire, Maughan and Stewart that the ‘evidence given at trial’ is ‘reassuringly’ the key influence on
juror decisions. Other research from New Zealand indicates that where an individual struggles to comprehend a case, other jurors provide support. For Young, therefore, the strength of juries lies in their ‘collective understanding, recall and diligence’. Recent research by Professor Sally Lloyd-Bostock (Birmingham University) into a serious fraud trial relating to the Jubilee Line extension of the London Underground found that jurors had understood and kept up with the evidence in the case (see The Times Law, 23 January 2007).

This conclusion arguably dents the government’s case for its Fraud (Trials without a Jury) Bill.

Peter Thornton QC argues that there is no merit in the argument about juries being swayed by experts and lawyers. In recent miscarriage of justice cases, such as those relating to suspicious cot deaths (Cannings, 2004), jury decision making could not be at fault because judges themselves had not challenged questionable ‘expert evidence’. He further lists those occasions when juries have demonstrated the capacity to ‘convict properly in the most grave of cases’; those cases involving serial killers or child killers in some of the ‘trials of the century’.

Moreover, the reforms to jury composition in the Criminal Justice Act 2003 have brought ‘professionals’ into the jury room, such as judges and lawyers. This has, ironically, led to concerns about the loss of ‘amateurism’ and the potential for professional influence or bias. However, in R v Williamson (2005), heard with R v Abdroskov, the Court of Appeal found that persons did not sit on a jury in any professional capacity but rather as citizens eligible for jury service; and that there was, accordingly, no perception of bias raised.

Jury secrecy

Following on from charges of jury incompetence, it has been argued that s.8 of the Contempt of Court Act 1981, which protects jury secrecy, prevents us from knowing whether jury deliberations are being conducted properly. The argument goes on to say that should the mask be allowed to slip, and the secrets of the jury room be revealed, abolition of jury trial might well be inevitable.

The traditional fears are borne out by the cases of Vaise v Delaval (1785), where jurors decided the case by tossing a coin (a phenomenon encountered more recently in the jury room in R v Connor and Rollock, 2004), and R v Young (1995), where jurors consulted a ouija board to determine the defendant’s guilt. In the latter case, a retrial could only be ordered because the otherworldly deliberations took place in a hotel and not the jury room at court. Thus, in Connor and Rollock and the jointly-heard appeal of R v Mirza (2004), concerning allegations of racial bias in the jury room, the House of Lords dismissed appeals from the defendants by asserting the principle of jury confidentiality.

However, jury confidentiality protects the full and frank discussion that allows for jurors to give expression to ‘jury equity’, resisting pressure from a judge or avoiding the harsh application of law to do what they perceive to be the right thing. A jury ignored the fury of the government, for example, when it acquitted Clive Ponting (1985), a civil servant alleged to be in breach of the Official Secrets Act for leaking information about the conduct of the British Navy during the Falklands War in 1982. Although this was

References

Darbyshire, P. (1991) ‘The lamp that shows that freedom lives — is it worth the candle?’ Criminal Law Review 740


Devlin, P. (1956) ‘Trial by jury’

Jenkins, S. ‘Ladies and gentlemen of the jury...’, Sunday Times (12 February 2006); ‘Why juries should be scrapped’, The Times (T2, 27 January 2005).


a perverse verdict according to strict law, it is arguably emblematic of the spirit captured by Lord Devlin when he talked of the jury as a 'bastion of liberty', a 'lamp of freedom' and a 'little Parliament'.

It is also the case that jury research from other jurisdictions, and the more limited investigation carried out here, do not bear out some of the fears arising from jury secrecy. Jurors do, on the whole, appear to follow the evidence, and they certainly take the standard of proof very seriously, as evidenced by higher acquittal rates in the Crown Courts than in the Magistrates' Courts.

The Contempt of Court Act 1981 could be amended so as to allow academic research on jury decisions, subject to clear safeguards. The government is in consultation on this issue.

Practicalities of jury trial

Despite the attention given to the criminal jury trial, it only accounts for about 1% of all criminal cases heard before the courts. The vast majority of cases are dealt with by magistrates, most of whom are also lay persons. Jury trial is therefore reserved for a relatively small number of cases, and yet the cost of some of these cases is proportionately huge. Simon Jenkins cites the remarkable Simon Jenkins case, in which a series of three trials took place (with legal proceedings costing an estimated £10 million in all) to determine whether the former head teacher had murdered his stepdaughter, Billie-Jo. Another case to capture the headlines was the Jubilee Line serious fraud trial (mentioned on p. 4), which, at the point of its collapse, had cost up to £60 million. Although differences in the length of cases make clear comparisons difficult, it is accepted that Crown Court trials are generally far more costly than Magistrates' Court trials.

The cost argument can, however, be put into perspective when some of the advantages of jury trial are considered. The appeal of jury trial can be traced back to the constitutional principle of 'trial by peers' that was embedded in our history by the Magna Carta (1215) and that has been expressed, in various forms, over eight centuries thus far (though as the government has pointed out in seeking to justify its curbs on jury trial, the right to jury trial in a similar form to the one we know today was not established until the mid-nineteenth century). Jury trial allows not only for justice to be done, but also to be seen to be done, and this instils public confidence in the justice system and provides a collective voice against the harsh application of law and potentially case-hardened judges.

Conclusion

There is no doubt that trial by jury has its critics, and recent government intervention in this area has caused some commentators to speculate about its future. However, abolition has been limited to two specific circumstances, and other far-reaching reforms to jury trial have been strongly resisted in Parliament. We may be at the point, to borrow from and paraphrase William Young, where evidence of the jury system's drawbacks may be far from frequent, but not frequent enough to give rise to public demand for change. Allowing academic research into juries will be a suitable test for a system 'hallowed by time'.

Other issues to look out for might include practical reforms relating to racial bias and the composition of the jury; and further consideration as to whether juries should provide reasons for their decisions. It may also be argued, of course, that the strengths of the jury system outweigh the weaknesses, and the symbolic value of jury trial, while masking practical difficulties, should not be underestimated. As Peter Thornton QC concluded, with reference to Lord Devlin's famous quote; 'Despite attempts to trim the wick, the lamp still glows brightly.'

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Key questions

1. Make a list of the reforms to trial by jury in criminal cases that have been proposed and/or made since the 1950s. Why have New Labour governments since 1997 not succeeded in getting all of their proposals on jury trials through Parliament?
2. The Criminal Justice Act 2003, in amending s.1 of the Juries Act 1974, has changed the way in which juries are chosen. Prepare a list, for revision, of the requirements for jury selection, using this article in conjunction with a textbook. Who cannot serve on a jury?
3. (a) Use your course textbook in connection with this article and other books from the library to devise a list of advantages and disadvantages for trial by jury in criminal cases, leaving space for examples. (b) Use this article to provide examples and arguments to support the list of advantages and disadvantages for (a) above.
4. Reread the conclusion to this article. Carry out research to see whether you can find proposals (a) on academic research into UK juries and reform of s 8 of the Contempt of Court Act; (b) on tackling the possibility of racial bias in randomly selected juries; and (c) on whether juries should have to give reasons for their decisions.