Juries? I have my doubts...

By Evan Whitton

Professor John Langbein quotes a German legal maxim:
*Ohne Begrundung kein Urtre...*without a statement of reasons, there can be no valid judgment.

If so, no common law jury verdict is valid; jurors have never had to give reasons. The system has been open to confusion and corruption since it was invented in 1166. For example, there are the cases of O.J. Simpson and a man tried for heifer-rustling at Dubbo, Australia, in the 19th century. Barrister Aubrey Gillespie-Jones reported the Australian verdict in *The Lawyer Who Laughed* (Century Hutchinson, 1978):

Judge's associate:	*Do you find the accused guilty or not guilty of cattle-stealing?*
Foreman:	*Not guilty, if he returns the cows.*
Judge:	*You swore you would try the issue between our Sovereign Lady the Queen and the accused and find a true verdict according to the evidence. Go out and reconsider your verdict ...*
Associate:	*Have you decided on your verdict?*
Foreman:	*Yes, we have. We find the accused not guilty, and he doesn't have to return the cows.*

Professor Mark Findlay, of Sydney University, did a study of jurors for the Australian Institute of Judicial Administration. In *Jury Management in NSW* (1994), he reported that he had access to a diary kept by a woman juror during a long trial. She noted:

> *On the first day, a majority decided that the accused must be guilty because he wore an earring; he looked too glitzy; he was ugly and hence probably bad; and his lawyer looked positively evil. During the trial the majority, led by a handsome banker, 'only listened to evidence or argument which reinforced their conclusion of guilt'.*

The woman was bullied and ostracised, described as a 'pinko lezzo', and threatened with being put on a hit list if she went against a guilty verdict. The verdict was eventually decided by a golf appointment. On the last day, the banker, expecting an early result, arranged to play golf, but 'when it became clear that [the woman and another juror] were not going to go along with a guilty verdict', he 'changed his mind and was followed by the rest'.

Reasonable doubt

Along with the right of silence, the formula for the standard of proof, beyond reasonable doubt, is the most effective device for getting criminals off.

Anyone can have a doubt; 'reasonable' has as many meanings as there are jurors; in some countries judges are not allowed to tell them that the formula simply means the same as the French formula, *conviction intime*: are we intimately (thoroughly) convinced?

As might be expected, the negative common law formula did not obtain until after lawyers had taken over the criminal process. Professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination*:

> *… the precise doctrinal formulation of the beyond-a-reasonable-doubt standard of proof in Anglo-American criminal procedure occurred at the end of the 18th century as part of the elaboration of the adversary system of criminal procedure. [Professor John] Beattie points to formulations of the standard of proof used in jury instructions of the 1780s that were still well short of beyond reasonable doubt.*

In 1998, the New Zealand Law Reform Commission published a study of 312 jurors who sat on 48 cases ranging from attempted burglary to murder. The study confirmed that the formula baffles jurors. The Commission reported:

> … many jurors, and the jury as a whole, were uncertain what 'beyond reasonable doubt' meant. They generally thought in terms of percentages, and debated and disagreed with each other about the percentage required for 'beyond reasonable doubt', variously interpreting it as 100 per cent, 95 per cent, 75 per cent, and even 50 per cent. Occasionally this produced profound misunderstandings about the standard of proof.

In the Hannes case mentioned below, the defence was that a Mr X, rather than Hannes, performed a certain action, and that, although Mr X was not produced, the prosecution could not prove beyond reasonable doubt that he did not exist. It might be thought that the jurors' common sense would find such a defence laughable, but they deliberated for five days and then asked Judge Cecily Backhouse to explain reasonable doubt. She told them:

> *The Crown must satisfy you of the guilt of the accused by establishing each of the essential ingredients of the charges to that standard, that is, beyond a reasonable doubt ... the accused is entitled to any reasonable doubt in your minds and the accused does not have to prove he is innocent ... the accused is presumed to be innocent until the Crown has established that guilt.*

In short, reasonable doubt means reasonable doubt or, as Miss Gertrude Stein (1874-1946) put it, a rose is a rose is a rose. One day, a jury foreman will politely say: 'I'll put the question again, judge.' Dr John Forbes wrote in *Evidence Law in Queensland* (7th edition, Lawbook Co, 2008):

> The beginners' handbook (Bench Book) for Queensland judges – the existence of which is now officially, if somewhat coyly, acknowledged – recommends this circumlocution:
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> *'A reasonable doubt is such a doubt as you … consider to be reasonable … It is therefore for you, and each of you, to say whether you have a doubt which you consider reasonable. If, at the end of your deliberations, you, as reasonable persons, are in doubt about the guilt of the accused, the charge has not been proved beyond reasonable doubt.*

Dr Forbes commented:

> Mesmeric repetition of the mantra as insurance against an appeal, or by a defender striving for a doubt, reasonable or unreasonable, may be taken by jurors unaccustomed or averse to responsibility, as invitations to acquit. It is then a short step to the comforting thought: *'I have just been described as a reasonable person. I think I have a doubt. Therefore it is reasonable.'*

Justice Robin Millhouse, of the South Australian Supreme Court, said in 1999:

> Very few people who've come up in the criminal courts when I've been trying them have not been guilty, but a lot of them have got off because jurors' common sense falters in the face of warnings about reasonable doubt. I've often felt my heart sink when I know a bloke's probably guilty, to have to give all these warnings and I'm afraid the jury will heed them. And they often do.

Justice Christopher Wright, of the Tasmanian Supreme Court, said in 2000:

> Too often unsure jurors will shelter behind the standard of proof beyond reasonable doubt, making it the safe option ... I am fully convinced that juries return a wrong verdict in about 25% of all cases.

Angelo Cusumano was murdered during an armed holdup of his Sydney store. Two men pleaded not guilty. A third man, Aaron Robinson, pleaded guilty to murder and told police that one of the others had given him ammunition for the murder weapon. However, Robinson refused to give evidence against the other two, and his statement about the loaded gun was concealed as hearsay. The prosecution thus could not prove that the other two knew the weapon was loaded. When they were found not guilty in 1998, a juror apologised to the victim's widow. Learning of the apology, a radio broadcaster, John Laws, asked the juror on air why she apologised. She said:

> *To me there was absolutely no doubt. To one other juror there was absolutely no doubt. People confessed on the jury that in their hearts they felt – but that it hadn't been proven ... I said ... please let us bring in an undecided verdict, and they said, absolutely not, it hadn't been proven ... And I fought for three days ... but I was too weak ... My heart goes out to Mrs Cusumano and those children.*

It is not a crime in the US to ask a juror what happened. It is in NSW. Laws was charged, convicted, and given a suspended sentence of 15 months.

A Melbourne lawyer kindly added to the sum of my knowledge on what he called 'the elephant in the room'. In *Justinian* (15 July 2008), I reported that, in a message to the proprietor, the lawyer noted a case in which 'the obviously bloody-minded jury', having been given 'the required but totally unhelpful non-direction on the standard of proof … responded with a question: "Reasonable doubt - 70 to 80%?"' The lawyer said the judge and a majority of counsel:

> … agreed that the judge would repeat the standard direction (with the jury no doubt wondering what on earth did this idiot have for breakfast or lunch depending on when the redirection was given) but on no account mention the 'P' word lest the silly sods get the idea that such a test is permissible in some way.

He added: 'Mr Whitton might be interested to know, if he doesn't already, that our trial directions are now publicly available on the web – see them at the Judicial College of Victoria website …' Thus encouraged, I found that the trial directions (Bench Notes to the Victorian Criminal Charge Book) state:

> Although in England the term "beyond reasonable doubt" is seen to be synonymous with the term 'sure' (see e.g., *R v Hepworth and Fearnley* [1955] 2 QB 600; *R v Onufrejczyk* [1955] 1 QB 388), this is not the case in Australia (*Thomas* v *R* [1960] 102 CLR 584; *Dawson v R* [1961] 106 CLR 1; *R v Punj* [2002] QCA 333).'

A little more research caused me to exclaim: Eddie Freaking McTiernan! I noted in *Justinian*:

> That means that Britain, home of the common law, now allows judges to tell jurors what the elephant means, but the colony has obstinately persisted in error for 48 years. The date of *Thomas v R*, 1960, means the guilty men were on the High Court run by the 'fraudulent' *(he wrote judgements under another's name - ed.)* Sir Owen Dixon. The lead judgment purported to have been written by Justice Sir Eddie McTiernan (1892-1990, Labor MP 1929-30, High Court 1930-76).
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> That raised two questions: Why would any future judge take the slightest notice of that ancient Labor Party hack and world champion judicial limpet?
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> And how many Australian murderers, rapists and organised criminals have escaped justice since 1960, when Eddie shut the door on an explanation of the formula?

ENDS

This article is drawn from Evan Whitton's book, *Our Corrupt Legal System*, which can be downloaded free from netk.net.au/whittonhome.asp

Mr Whitton received the Walkley Award for National Journalism five times and was Journalist of the Year 1983 for "courage and innovation" in reporting a corruption inquiry. He was editor of *The National Times*, Chief Reporter and European Correspondent for *The Sydney Morning Herald* and Reader in Journalism at the University of Queensland. He is now a columnist on the online legal journal Justinian www.justinian.com.au

CLA Civil Liberties Australia
Box 7438 Fisher ACT Australia
Email: secretary [at] cla.asn.au
Web: www.cla.asn.au