Hung Juries in Light of the Plumley Walker Trials

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In February 1989 the body of Peter Plumley Walker was found floating in the Waikato River, not far from Huka Falls. His wrists and ankles were bound, his buttocks bruised. The state of decomposition suggested that the body had been in the water for about a week.

Searches of Plumley Walker's flat led police to the Remuera address of Renee Chignell and Neville Walker. When initially questioned by the police, both Chignell and Walker denied knowing the deceased. However, after the discovery of a security video which the police said showed the duo with Plumley Walker's car, Chignell admitted that Plumley Walker had attended a bondage and discipline session at her flat. She was charged with murder on 16 February. In late April, Walker admitted to throwing Plumley Walker's body over Huka Falls and he too was arrested and charged with murder.

The first trial commenced in November 1989. The Crown alleged that Plumley Walker had gone to the flat on the afternoon of 27 January 1989 and had been tied up at the wrists and ankles before being chained to a wall. Neville Walker then beat the deceased with his fists and an iron bar. After a short interruption, Plumley Walker was taken down, walked to his car and driven to Huka Falls. Once there, his wrists and ankles were bound, and he was thrown into the falls alive.

Chignell claimed that Plumley Walker requested her to tie his hands up tightly, put a rope around his neck, and put a dog-collar on him, pulling the chains so tight that he had to stand on tiptoe. Returning to the room after a coffee break, she found

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him slumped forward, his hands blue. She and Walker put him in his car, drove to Taupo, and dumped the body over the Huka Falls.

The jury deliberated for thirteen hours before reaching a verdict of guilty for both accused. This was overturned by the Court of Appeal some six months later,[1] when it became apparent that the High Court Judge sitting on the case had not made it sufficiently clear to the jury that, in order to find the accused guilty of murder, they had to agree unanimously that the death had occurred at Taupo or, in the alternative, that the death had occurred at Auckland. A retrial was ordered on the basis of inadequate direction from the judge on the alternative scenarios and the different considerations of fact and law applicable in each of the alternative charges.

The Auckland scenario was not as straightforward as the jury was led to believe. In its decision, the Court of Appeal described the law as follows:[2]

> Murder there [Auckland] would require a finding that Chignell killed Plumley Walker and a decision as to whether she meant to or was reckless whether death occurred through knowing that the injury she inflicted was likely to cause death.

The second trial commenced in early February 1991 and ended three weeks later in a hung jury. The jury had deliberated for twenty-seven hours but, despite further instructions from the judge, it was unable to return the required unanimous verdict.

The third and final trial started in May 1991, and resulted in an acquittal for both accused. The writer sat in court for most of this trial, having watched the jury selection on the first day. The study of the trial and the jurors was undertaken with the intention of focusing on the behaviour of the jury during the trial, with specific attention being paid to the group's dynamics, the impact of witnesses and counsel on jury members and, most importantly, their response to the judge's body language and verbal direction.

This article seeks to address one of the most controversial aspects of this trial and others in recent times, that of the hung jury. Some have suggested that New Zealand should follow several other jurisdictions and introduce a majority verdict in the expectation that such a verdict would result in fewer hung juries and consequently less burden on the taxpayer. However, the psychological and sociological studies discussed in this article suggest that the unanimous verdict produces a more sound result. The information gained from these studies has been invaluable and, it is submitted, should be followed up by academic insights into jury room dynamics before any reform to the present system is carried out.

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1 *R v Chignell* [1991] 2 NZLR 257.

2 Ibid, 265-266.

I: HUNG JURIES: ARE THEY REALLY A PROBLEM?

In most jurisdictions, juries hang in approximately four per cent of cases.[3] Apart from the obvious concerns regarding the economic burden on the state, one of the most common criticisms of hung juries is the feeling of frustration left with the jury itself. A recent study in the United States revealed that members of hung juries "typically report their feeling that they have let the court down."[4]

Hastie, Penrod and Pennington's study[5] has been the most revealing analysis of jury dynamics to date. Their conclusions emphasised the importance of hung juries to the legal system:[6]

> Hung juries have a conceptual and symbolic significance that is far greater than their frequency of occurrence would indicate. This is because they signal a failure of the jury institution to produce its desired result of a clear and unequivocal decision. However, the label of "failure" is misleading, for the hung jury is "a valued source of integrity" and has been interpreted as a sign that antidefendant bias was not present.

The economic burdens on the state continue to be the major reason behind the call for reform in New Zealand. Similar concerns arose in Oregon in 1934, resulting in the introduction of the majority verdict. A study of the new verdict, conducted many years later, found that the possible economic savings made by introducing the majority verdict were negatived by the increased burden on the defendant.[7] Kirkpatrick expressed this burden in terms of the smaller number of jurors required to reach a verdict and the consequent lessened burden of proof on the prosecution to reach that verdict. This issue will be discussed in more detail later in this article.

II: THE SELECTION OF JURIES

1. New Zealand

The selection of juries in New Zealand is ruled primarily by the Juries Act 1981. Each defendant and the Crown are entitled to six peremptory challenges without cause.[8] Where there are two or more accused persons indicted together in a criminal case, the Crown is entitled to twelve such challenges.[9]

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3 Brookbanks, "Hung Juries or Majority Verdicts: The Jury on Trial" [1991] NZLJ 188, 189; Kalven & Zeisel, *The American Jury* (1966); New Zealand Royal Commission on the Courts (1978).

4 Hans & Vidmar, *Judging the Jury* (1986) 111.

5 Hastie, Penrod & Pennington, *Inside the Jury* (1983).

6 Ibid, 165-166, in reference to Kalven & Zeisel, supra at note 3, at 453; *Ballew v Georgia* 435 US 223 (1978).

7 Kirkpatrick, "Should Jury Verdicts Be Unanimous in Criminal Cases?" (1968) 47 Oregon LR 417, 423.

8 Juries Act 1981, s 24(1). A challenge without cause is a challenge for no reason.

9 Juries Act 1981, s 24(2).

Section 25 of the same Act allows each party the right to any number of challenges for cause on the ground that a juror is not indifferent between the parties. These challenges are usually conducted in chambers and are rare in New Zealand due to the difficulty in obtaining information about the prospective jurors prior to trial, although it is possible to do some outside research on the jury list. The most common information available to counsel in the jury selection procedure is the physical appearance of jurors, their addresses and their occupations.[10]

The weekly jury selection procedure begins with a roll-call of those who have been selected from the electoral roll and is eventually followed by the challenge process. This consists of names of the gathered prospective jurors being taken at random from a ballot box. In the time between the name being called and the juror taking his or her seat in the jury box, counsel must exercise their right of challenge without cause.

In the third Plumley Walker trial, most of those challenged were Pacific Islanders, Maori, and men in the same age range as the accused Walker. Once the twelve were selected, the rest were sent out of the courtroom to another, where they were to face the same procedure again that morning, the process being repeated until the required number of jurors for the week had been chosen.

The Plumley Walker jurors were at work within minutes, the judge taking several minutes to brief them on the hours of court sitting, the approximate length of the trial and the rule that they were to discuss the trial with no-one but each other. Due to the publicity the trial had already received, he also made it plain that they were to disregard all news reports they had ever read or seen about the trial.

2. United States

The selection procedure in New Zealand seems less cumbersome when compared to the American system of the voir dire. This involves the pre-trial questioning of jurors on such factors as their qualifications for jury service, their knowledge of the defendant and the case in general, and their attitudes towards issues or individuals in the case that might bias their views of the trial evidence.[11] The trial judge specifies how broad or specific the questions may be in relation to the case. The prospective jurors may be dismissed with a challenge for cause if the judge determines that they would have difficulty being fair and impartial jurors. If this does not happen, counsel are still able to have the juror removed with a peremptory challenge. The exact number of challenges varies with the type of case and the jurisdiction.[12]

The voir dire process is better able to sort out any jurors who may be biased in any way. Its advantages are, however, outweighed by the length of the process. An

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[10] Doyle & Hodge, *Criminal Procedure in New Zealand* (3rd ed 1991) 146.

[11] Hans & Vidmar, supra at note 4, at 67.

[12] Ibid.

example of this was the John DeLorean trial in the early 1980s, in which the jury selection took a total of seven weeks.[13] DeLorean had been arrested and charged with conspiracy to smuggle cocaine. As part of the evidence, the FBI presented videotapes of the accused with a suitcase full of drugs. Despite this damaging evidence, DeLorean was acquitted of the charge. The accused appeared to have been framed by an undercover government informant, who had been caught with drugs himself a year earlier and had since joined the government's anti-drug campaign.

The defence thought their success would depend upon the jury selection. Their strategy was not to pick the usual sympathetic types – instead, they looked for individuals who seemed thoughtful enough to see the complexity of the case and who would understand the entrapment issue that the defence planned to raise.[14]

The jurors were later interviewed for the American Lawyer magazine and gave significant insights into the impact of the witnesses on them. When asked about their reasons for the acquittal, one juror said:[15]

> We weren't trying to make policy or send messages, but there is a message here .... It's that our citizens will not let our government go too far. We just looked at the evidence, and I for one saw that the government had gone too far in this case.

3. United Kingdom

Until recently, the English courts used the peremptory challenge system. However, this was abolished by the 1988 Criminal Justice Act, leaving the defence lawyers with no means of influencing the composition of juries.[16] The removal of the peremptory challenge seems to suggest that any policy in this area will be influenced only by the judge and the prosecution. The issue remains, as in all jurisdictions, one of attempting to select a jury that is representative of the community. It is not about selecting a jury favourable to the defence, but of ensuring the confidence of the public in the verdict rendered.[17] It is difficult to see how this can be achieved when the rights of selection are only available to the prosecution.

Reforms of the jury selection process in the United Kingdom may eventually move in the direction of the American voir dire. A revival of the now infrequent challenge for cause would be available to both prosecution and defence, with the scope of the questions being decided by the judge. Some have suggested this method would not only reinstate the right of the defence to have some part in the jury selection, it would also provide more guarantee that those sitting on juries are

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[13] Ibid, 14.

[14] Ibid.

[15] Brill, "Inside the DeLorean Jury Room" (1984) American Lawyer 94, 105, as quoted in Hans & Vidmar, supra at note 4, at 18.

[16] Enright, "Reviving the Challenge for Cause" (1989) 139 New LJ 9, 10.

[17] Davies, Editorial (1989) 139 New LJ 65.

qualified and are willing and able to do so.[18]

III: THE UNANIMOUS VERDICT

There are no accurate indications as to when the unanimity rule was formulated in criminal law. However, most commentators believe it to have been in place since the late fourteenth century.[19] In medieval times, there was no trial as we know it in the modern sense. Instead, twelve witnesses who were supposed to have knowledge of the relevant facts were drawn from the local neighbourhood and decided which of the parties in dispute was to prevail. The match was won when one of the parties secured twelve oaths in his favour. The jury grew from this process, and gradually evidence was introduced at the trial. From there, the unanimity rule remained firmly in place in most jurisdictions until this century.[20]

Crucial to the element of fairness in criminal trials is the standard of proof beyond reasonable doubt. This safeguard is intricately bound to the unanimous verdict and ensures that the verdict is reached with the highest possible level of certainty. The problem that has emerged from the detailed studies of juries conducted during the 1970s and 1980s is that jurors have real difficulty in understanding what the standard of proof actually means. This is often based on the jurors' differing interpretations of "reasonable". In a case comment discussing the standard of proof and jury verdicts, the problem was articulated in these terms:[21]

> The existence of dissent does not necessarily demonstrate that either the majority was wrong or that the dissenters were acting unreasonably: both may agree that the defendant is probably guilty, and differ only as to whether a doubt that they share is 'reasonable'.

The Hastie study,[22] published in 1983, analysed the complete pattern of communication in mock juries, as well as the context in which the comments were made. The most disturbing find was that the discussion of the standard of proof took up hardly any time at all. Hastie and her colleagues suggested that this may be due to "jurors' failure to understand when to apply this standard of proof".[23]

This is a significant finding and one that has some bearing in the modern courtroom, where prosecutors, defence counsel and judges spend a great deal of time trying to explain this crucial element of the trial. These explanations often occur when the jury's attention may be at its lowest. The start of a trial occurs within minutes of the jury being sworn in. For those jurors unfamiliar with

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18 Enright, supra at note 16, at 10. The United Kingdom has been having increasing problems with jurors sitting who are unable to read or write (although this may not necessarily be a "problem"), who cannot speak English, or who are disqualified from sitting for the usual reasons such as falling within the excluded occupations or having a past criminal record.

19 Van Dyke, *Jury Selection Procedures* (1977) 204; Case Comment, "Unanimous Criminal Verdicts and Proof Beyond a Reasonable Doubt" (1964) 112 U Pa L Rev 769.

20 Case Comment, ibid, 771.

21 Ibid, 772.

22 Supra at note 5.

23 Ibid, 97.

courtroom practice, it seems likely that the initial experience of jury selection and public exposure from sitting in the jury box might overwhelm the jurors and lessen the effect of the prosecutor's opening address, which inevitably endeavours to explain the intricacies of the charge and the burden of proof.

Of real significance in the Hastie analysis was the link between the standard of proof and the differences found between the deliberations on probabilistic issues. It seems the jurors rarely understood the relevance of the standard of proof to their verdicts when the defendant unquestionably caused the victim's death. The authors stated:[24]

> When a probabilistic issue, such as the possible identification of the perpetrator of a crime as the defendant, is the focus of the trial, then discussion of the standard of proof is prominent in deliberation. However, when the standard of proof is applied to intuitively less probabilistic elements of the crimes charged, such as the defendant's state of mind, then the jury fails to heed the trial judge's instruction that each element of a crime must be established beyond a reasonable doubt to return a guilty verdict.

In Barber and Gordon's account of juror experiences,[25] the problem of jurors' understanding of the burden of proof also came to light. Many of the jurors felt their job was simply to ask whether or not the defendant committed the crime, and thus convicted on the balance of probabilities. A law lecturer's published account of her experiences as a juror in the United Kingdom included juror comments such as "I'm saying guilty but I don't believe those police".[26] In her experience, the majority eventually managed to persuade the convicting jurors to acquit, once the standard of proof had been explained to them again.

IV: THE MAJORITY VERDICT

1. United Kingdom - Why it was Introduced

The two principal reasons for the English courts' change from a unanimous verdict to one of a 10:2 majority were to rid the system of jury nobbling and of eccentric, irrational jurors. In his speech to the House of Commons, the then Secretary of State for the Home Office, Roy Jenkins, said:[27]

> [Majority verdicts] are not likely to result in different verdicts in many cases, but these few cases may well be crucial from the point of view of law enforcement and the breaking-up of criminal

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[24] Ibid, 87.

[25] Barber & Gordon (eds), *Members of the Jury* (1976), in Darbyshire, "Notes of a Lawyer Juror"(1990) 140 New LJ 1264, 1266.

[26] Darbyshire, ibid; see also McCartney-Filgate, "The origins and history of the criminal jury and movements towards reform" Unpublished Paper (1991) 98-99, where six of the twelve members of the jury on which the author sat could not distinguish between when a defendant was charged and when a defendant was convicted. They thought that the fact the defendant was charged meant that he was guilty.

[27] As quoted in Hans & Vidmar, supra at note 4, at 172.

> conspiracies .... The disagreements undoubtedly occur ... because one or two jurors have been persuaded, by bribery or intimidation, to hold out against the evidence.

There had in fact been only a couple of cases where nobbling was known to have occurred and many saw this reform as a hasty step which had not been adequately thought through. The majority system now in place ensures that the nobbler must secure the cooperation of three other jurors, or one juror of such strong personality that he or she is able to persuade others to the alternative viewpoint. In 1973, Sir Richard Wild suggested that the change to majority verdicts was made because it was thought too many defendants had been wrongly acquitted, rather than wrongly convicted.[28]

One of the arguments frequently advanced against majority verdicts is that the dissenters may never get a real say in the deliberations.[29] The English reform in 1967 tried to get around this problem by insisting that a jury deliberate initially under the unanimity requirement, but if they could not reach a verdict within two hours and ten minutes, they could work under the 10:2 majority system.[30] It seems that the judge is not obliged to send a deadlocked jury back to deliberate to find a majority verdict, but may accept the disagreement and discharge them.[31]

The new rule does not of course mean that minority jurors have a better chance of expressing their viewpoint. In fact, as the research about to be discussed has established, the majority verdict could almost be seen as an assurance that only the majority will have any real say in the matter. This appears to be a particular danger in cases where the juries are discharged on a Friday afternoon. Four years ago, a juror in the United Kingdom was interviewed by the New Law Journal about his experiences.[32] His jury sat on a brief trial which started on a Friday afternoon, in which the jury were sent out to deliberate at about 3.30pm. He said:[33]

> [T]he people who'd been on a jury before knew about the majority verdicts. They wanted to get home and said there was no point in arguing. 'Let's wait until 2 hours and 40 minutes have gone and we'll go back and ask for a majority verdict.' People would have voted either way in order to get home.

Another insight into the jury room was given some two years later, where the Friday afternoon effect was confirmed by another juror. In the two hours and forty minutes total deliberation time, this jury only truly deliberated for half an hour.

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28 Sir Richard Wild commented on the jury system in *The Evening Star*, 16 October 1973, 4; see Burns, "A Profile of the Jury System in New Zealand" (1973) 11 West Aust L Rev 105-109.

29 For further discussion, see text, infra at pp69-70.

30 Van Dyke, supra at note 19, at 206. The statutory provision enabling majority verdicts to come into force is s 13 of the Criminal Justice Act 1967. The Practice Direction of 1970 provides that any verdict of a majority shall not be accepted until two hours and ten minutes have elapsed between the time when the last juror has left the jury box to go to the jury room and the time when there is put to the jury the first of the questions set out in the 1967 Direction – see 124 New LJ 105.

31 Ibid; see also *R v Elia* [1968] 2 All ER 587.

32 The interview was heavily censored due to s 8 of the Contempt of Court Act 1981.

33 Eldin, "A Juror's Tale" (1988) 138 New LJ 37.

The vote had become deadlocked at 8:4 in favour of not guilty very early in the deliberations and the only improvement made in the remaining time was to 9:3. While the jury waited out the required two hours until they could send out a message as to their position, they passed the time in social chit-chat.

During this time, one of the jurors shared his experiences of another trial he had sat on where the jury had reached stalemate on a Friday afternoon. It was clear from his discussion that once the threat of a weekend locked away in deliberation became a realistic possibility, the jurors forfeited all principle and were prepared to vote either way just to get home. Thoughts of missed dinner parties, weddings and even doctors' appointments appeared to carry more weight than the determination of the guilt, or lack of it, of the accused![34]

2. How the United Kingdom Majority System Works

Under s 13 of the Criminal Justice Act 1967, the presiding juror of a jury returning a guilty verdict is required to state whether the verdict was unanimous or that of a majority. If it was a majority decision, the presiding juror must state what the majority was. This information does not have to be disclosed in the case of an acquittal.[35] The reasoning behind this is to prevent any prejudice to the accused that may arise if it were public knowledge that some jurors did not believe the accused to be not guilty.[36]

The problems arising in the rendering of majority verdicts in the UK appear to be escalating the already profound issue of jury deliberations in general. The rule that the presiding juror does not have to disclose whether the verdict was unanimous or in the majority in the case of acquittals has resulted in an impossible situation for statisticians of the UK courts, who have no way of ascertaining what the real influence of the majority verdicts has been. It is possible to argue that the sanctity of the jury room has already been violated with the requirements for guilty verdicts, and that the same procedure should be used for acquittals.[37]

3. Majority Verdicts in Australia

The states of Tasmania, South Australia and Western Australia provide for majority verdicts, all of which allow for a unanimous deliberation first. This period varies from four hours in South Australia to two hours in Tasmania. Tasmania reformed its laws on jury verdicts in 1936. The reasoning of the then Chief Justice of Tasmania, Sir Herbert Nicholls, in favour of the majority verdict, was similar to that advocated in the UK in 1967 and in the United States on various occasions:[38]

> [T]he efforts of the police in gathering evidence which, after it has been subjected to all the checks imposed by law for the benefit of accused persons, should convince any reasonable man that the

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34 Darbyshire, supra at note 26, at 1266.

35 Editorial, "Majority Verdicts – The Case for the Whole Truth" (1968) 118 New LJ 787.

36 Cornish, *The Jury* (1968) 69.

37 Supra at note 35.

38 Editorial (1936) 10 ALJ 123.

> real offender has been caught, may be frustrated by the stupidity, eccentricity or worse of one member of a jury.

Nicholls did not seem to consider the relevance of the situation where that lone juror may in fact be correct. Allowance must be made for the juror who is perhaps more intelligent than the rest, or has a more thorough grip on the concept of "beyond reasonable doubt". In New Zealand's criminal history, the second Plumley Walker trial may be an instance of where this situation has occurred.

New South Wales, Victoria and Queensland still use the unanimous verdict, possibly for the simple reason of public confidence. The issue of majority verdicts has not been seriously discussed at all in New South Wales. Victoria played with the idea in the 1930s but rejected it on the grounds of the speculation and uncertainty it would induce. Queensland has never entertained the notion, its unanimity provision being firmly entrenched in the Criminal Code.[39]

4. Majority Verdicts in the United States

Originally, the unanimous verdict was incorporated into the Constitution by the Sixth Amendment, which read:

> The trial of all crimes ... shall be by an impartial jury of freeholders of the vicinage with the requisite of unanimity for conviction, the right of challenge and other accustomed requisites.

The language concerning unanimity was later deleted, as the Senate believed that trial by jury was held to encompass that ideal.[40] Two cases in 1972 proved that belief to be unfounded, when the United States Supreme Court allowed the change to majority verdicts despite some very powerful dissenting judgments.[41] Both cases were based on appellants' claims that their rights had been violated by being convicted on less than unanimous verdicts. In attempting to address the issue of a defendant's fundamental rights, the justices considered whether or not all the jurors' viewpoints would have been considered and specifically addressed the issue of whether the minority viewpoints would have had a place in the deliberations at all. One of the most forceful judgments in favour of a majority verdict came from Justice Byron White. He said:[42]

> We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favour of acquittal, terminate discussion, and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction.

The dissenters, on the other hand, felt that the unanimity requirement ensured fairness and community confidence in the criminal justice system. Justice William

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39 Downie, "And Is That The Verdict Of You All?" (1970) 44 ALJ 482, 484-485.

40 Van Dyke, supra at note 19, at 204.

41 *Johnson v Louisiana* 406 US 356 (1972); *Apodaca v Oregon* 406 US 404 (1972).

42 Ibid, 361.

Brennan made it clear that the Sixth Amendment did require unanimity. He said that majority verdicts could destroy the right of all groups in the community to participate in the judicial process.[43] Justice Thurgood Marshall, in answer to the calls for the elimination of juror irrationality, commented that:[44]

> The juror whose dissenting voice is unheard may be a spokesman, not for any minority viewpoint, but simply for himself – and that, in my view, is enough. The doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt.

Justice Marshall wanted to make it plain to the Court that the problem of introducing majority verdicts went far beyond that of excluding identifiable minority groups. The issue lay deep within the oldest principles of criminal law, that the burden of proof lay with the government. Any verdict less than a unanimous one did "violence to language and logic" to say that this burden had been discharged.[45]

The dissenting judgments in *Johnson* raised two issues that were to direct jury research for the next fifteen years. These were:

(i) the nature of the deliberation process – whether all the viewpoints are fairly and justly considered under the majority rule; and
(ii) whether a verdict by majority is as acceptable in the community as a verdict by unanimity.

V: THE DIFFERENCES BETWEEN UNANIMOUS AND MAJORITY VERDICTS

Most researchers who have tackled the issue of majority versus unanimous verdicts have come out in favour of the latter,[46] including three of the more recent studies.

1. The McCabe and Purves Study (1974)

This experiment was run in the UK and used shadow juries recruited over a period of two years from the electoral rolls. They were put into the courts' public galleries to listen to thirty trials in total. When the real jury went out to deliberate, these juries were withdrawn from the court and undertook their own discussion of the case before bringing in a verdict. These discussions were recorded and transcribed, with the research concentrating on three issues:

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43 Ibid, 396.
44 Ibid, 402-403.
45 Ibid, 401.
46 See for example Van Dyke, supra at note 19, at 211-213; Harman & Griffith, *Justice Deserted: The Subversion of the Jury* (1979); Wrightsman, Kassin & Willis, *In the Jury Box: Controversies in the Courtroom* (1987) 252; Hastie, supra at note 5.

(i) how the real jury might have felt about the case before it;
(ii) how the real jury might have reacted to the defendant or defendants and the witnesses; and
(iii) how the shadow jury reached its verdict.

Two factors tended to dominate the shadow juries' deliberations. One was the personal knowledge of the jurors in relation to the facts of the case. The other was the authenticity of the evidence given by the police. A clear link was found between the verdicts and the amount of criticism of the prosecution and the police evidence. These criticisms were far more frequent in the cases of not guilty or hung verdicts than in those resulting in conviction.[47]

It was found that when a shadow jury took a vote at the start of deliberations, the vote rarely changed by more than two moves in either direction. Those votes which were initially 9:3 became 10:2, and most which started at 11:1 became unanimous. The content analysis of the taped discussions showed that jurors' opinions formed during the trial tended to crystallise quite early in the deliberations.[48]

Perhaps the most significant result of the study was the subjects' emphasis on the importance of the judges' directions to the juries. The subjects made it quite clear that they considered the judge to be more influential than anyone else in helping the jurors come to an understanding of the facts and the relevant law in the case. Their deliberations often referred to these directions and they frequently recalled the instruction that their verdict was only to be based on the evidence presented in court. This was especially prominent when the deliberations went astray. It was also apparent that the overall assessment of the evidence was dependent on the collective memory of the jury.[49]

McCabe and Purves concluded that future jury research needed to focus on a comparison between a transcript of the judge's summation and the jury deliberations following it. The standard of proof proved to be a problem for the jurors, especially where the evidence was circumstantial or inferential. This difficulty was most apparent in those cases which turned on the finer points of *mens rea*. For example, in a case involving a shoplifting charge, one juror who was holding out for conviction focused only on the *actus reus* element of the crime. In this juror's mind, as long as the defendant had put the item in her bag, she was guilty of theft. The other jurors had quite a time trying to explain to their colleague that a mental element was also required.[50]

McCabe and Purves' study showed that the jurors took their task extremely seriously. They were not prepared to let "hunches" lead to conviction, but instead

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47 McCabe & Purves, *The Shadow Jury at Work* (1974) 14.
48 Ibid, 10.
49 Ibid, 32-33.
50 Ibid, 38.

looked determinedly for evidence upon which the conviction could be based. They did have a higher tendency to convict than the real juries they were shadowing which suggests that, despite their determination, the real juries felt more responsible than did the shadow juries, who were participating with the knowledge that their deliberations were not the real thing.

2. The Hastie Study (1983)

Subjects were recruited from the Superior Court jury pools in three counties of Massachusetts and were shown a video of a re-enacted murder trial. The subjects were then randomly assigned to one of the following groups:

(i) unanimous decision, 12:0
(ii) majority decision, 10:2
(iii) majority decision, 8:4.

The study focused on the effects of varying the decision rule[51] and the types of behaviour displayed during deliberation. A pattern emerged as to the way in which jurors attacked their deliberations.[52] They tended to begin with a discussion of the agenda for deliberation or voting, where the groups fell into either an evidence-driven deliberation, or a verdict-driven deliberation. The former method reviewed the evidence quite broadly and assessed it, looking for a general account of the events, with voting ballots taking place quite late in the deliberations. The latter method began with a ballot so that the numbers for guilty, not guilty and undecided could be ascertained immediately, with the pattern of polling continuing to be frequent throughout the deliberations.

Measurements were taken on the formal voting rates in each of the groups. On average, the unanimity groups took a head count every 23.4 minutes, the 10:2 majority every 15.4 minutes and the 8:4 majority every 19.7 minutes.[53] The inference drawn from this was that a unanimity requirement induced "an integrative, evidence-driven deliberation style"[54] while the majority verdicts favoured the verdict-driven style. The implications of these results are enormous. They suggest that if a majority verdict were to be introduced into New Zealand's criminal system, it is highly likely that the evidence would hardly be discussed at all, especially once the required majority is reached.

Another significant finding of the Hastie study was the in-depth analysis of the period following a majority of eight being reached in the unanimity and 10:2

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[51] "Decision rule" meaning the type of jury verdict, unanimous or majority, required to reach a verdict.

[52] Hastie, supra at note 5, at 24.

[53] Ibid, 90.

[54] Ibid.

groups. It was discovered that crucial events happened at this point in the deliberations. For example, in twenty-seven per cent of the cases, there were requests for more direction from the judge, and in thirty-four per cent of the cases discussion centred on the standard of proof at this time.[55] Contrary to popular belief, a majority of eight did not necessarily mean the final verdict had been determined. The authors concluded that:[56]

> In unanimous decision rule juries a number of important events, including reversals of the most popular verdict choice, substantial portions of the discussion, and requests for further instructions, occurred during the period after the largest faction exceeded eight members. This and other findings in the analysis of deliberation content strongly imply that the unanimous decision rule should be preferred over majority decision rules.

This finding rules out any suggestion that majority verdicts of 8:4 are appropriate. It also suggests that 10:2 verdicts may result in inadequate deliberation, as the most vital stage of the process may have only just begun when the quorum reaches ten in number.

The faction sizes of the guilty, not guilty and undecided groups proved to be very influential on the deliberating process. A significant difference between the unanimous and majority verdicts was that in the former, there were large shifts from the initial verdict. The most dramatic changes occurred in the last moments of deliberation, when jurors looked seriously at other options and a move towards a more lenient verdict often eventuated.[57] For those jurors in large factions, the likelihood of moving from that faction was very remote. However, in the majority verdicts, it was less likely that a juror would leave the smaller faction. The authors concluded that there were "substantial numbers of holdout jurors in nonunanimous juries."[58]

The results of the faction analysis are totally contrary to all the evidence previously advanced in favour of the majority verdict. Those advocating such verdicts have maintained that unanimity is the cause of the "holdout" juror. Hastie's results show that the introduction of a majority verdict may in fact cause more problems with eccentric and irrational holdouts, or even genuine holdouts, than does the unanimous verdict.

3. The Wrightsman Study (1987)

Wrightsman and others conducted their research using controlled mock juries in which groups of six deliberated on the facts of a case involving first degree murder. The study focused on the deliberation process in regard to unanimous and two-third majority verdicts and were videotaped without the subjects' knowledge. When the group had reached its verdict, members completed questionnaires on the

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[55] Ibid, 96.
[56] Ibid, 98.
[57] Ibid, 102.
[58] Ibid, 106.

following areas of interest:

(i) their perceptions and impressions of other group members;
(ii) their assessment of the deliberation process; and
(iii their moods during the process of deliberation.

It was found that the jurors tended not to deliberate to unanimity unless they were forced to do so. The researchers' general impressions were that majority juries will never reach consensus, that they are less effective in convincing all members that the verdict is the appropriate one, and that the deliberations were shorter and less robust than those where a unanimous verdict was required.[59] Their findings gave great weight to the comments of Justice William Douglas in *Johnson*, who said:[60]

> It is said that there is no evidence that majority jurors will refuse to listen to dissenters whose votes are unneeded for conviction. Yet human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity.

One of the most impressive findings of the study was the far shorter deliberation time in the majority verdict situations. This was especially apparent when the majority were in favour of guilty. Subjects commented that they felt less convinced of the final verdict when verbal consensus was not required.[61]

Another significant finding was that the study showed a reasonably high tendency for the minority to prevail in the deliberations, but this pattern only occurred when the minority favoured not guilty. Wrightsman suggested that this may have been because the position of not guilty is easier to defend, that it is easier to raise a reasonable doubt than to convince a person beyond such doubt.[62]

The Wrightsman study clearly corroborated the worst fears of the dissenting judges in *Johnson*.[63] The groups allowed to return a majority verdict tended to stop short of achieving verbal consensus, whereas those working with the unanimity requirement tended to be more effective in persuading the group members that the final verdict was the appropriate one.

The results of the three studies discussed above found favour with the ex-jurors the writer spoke to at the High Court, who emphasised the impact of not only the judge's directions to them at the end of the trial, but also of the judge's body language in court when evidence was being presented. If the judge looked bored or uninterested as the witnesses gave evidence, the jurors interpreted this as signifying that the evidence was not of great importance. If the judge appeared to favour either the prosecution or defence in the summing-up, the jurors gave that evidence more weight in their deliberations.

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59 Wrightsman, supra at note 46, at 252.
60 *Johnson v Louisiana*, supra at note 41, at 389.
61 Wrightsman, supra at note 46, at 251.
62 Ibid, 252.
63 Ibid.

VI: THE PLACE OF THE MINORITY IN MAJORITY RULE JURIES

Central to the whole debate as to whether unanimous or majority verdicts are preferable in criminal law are the contributions of the minority faction of the jury. The in-depth analyses of jury deliberations discussed above have shown a predominant tendency for the minority to have less input in majority rule verdicts.

One of the first jurisdictions to change to the majority rule was the state of Oregon. In 1934, two reasons were advanced for the abolition of the unanimous rule. First, it was suggested that mistrials were caused by a chronic dissenter, who was "blind to the evidence and deaf to rational argument".[64] Second, many believed that corrupt jurors were hanging juries and that this problem should be eliminated.

Kirkpatrick wrote of the 1934 abolition not long after the publication of the first major piece of jury research, *The American Jury*.[65] He submitted that the idea of irrational jurors hanging juries was a fallacy and that any such person should be eliminated in the voir dire examination. In response to the argument regarding corruption, he pointed to the recent findings of the Kalven and Zeisel study, which had found that a majority vote of 10:2 would not have had any effect on the problem, as there would need to be more than one or two corrupt jurors if they were to have any influence on the deliberations.

Kirkpatrick stressed that the minorities are often right, and emphasised the significance of the more articulate members of the group making up the minority. These jurors are likely to have great powers of persuasion, but may only get the chance to exercise them in trials allowing unanimous verdicts. It is important to realise that Oregon does not provide for the unanimous decision in the way that the United Kingdom does, and that the problem Kirkpatrick has raised has more likelihood of occurring in the United States than in the Commonwealth jurisdictions. However, when looking at the overall issue of whether unanimous or majority verdicts are preferable, the bottom line remains the same. The lone juror should still be seen as furnishing "a safeguard against precipitancy", ensuring that all relevant questions are addressed adequately by the jury.[66]

In the Hastie study it was found that deliberation usually ended when the required quorum was reached under the majority rule. The majority rule juries also tended to use the verdict-driven deliberation approach more frequently, which often resulted in disjointed evaluation of the evidence and incomplete contributions from the minority.[67]

One of the major dynamics discovered in the Hastie study was in a jury where a lone juror held out against eleven others. The holdout was strongly isolated in the

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64 Kirkpatrick, supra at note 7, at 419.

65 Kalven & Zeisel, supra at note 3.

66 Forsyth, *History of Trial by Jury* (2nd ed 1875) 204; quoted in Kirkpatrick, supra at note 7, at 424.

67 Hastie, supra at note 5, at 163-165.

deliberation process. This juror spoke up briefly after the judge's directions to the jury in its state of deadlock, but then retreated into silence and refused to participate any further in the deliberations.[68] Faction size was found to be an important determinant of the probability of an individual's participation. The larger the faction, the less probability that an individual would speak.[69] The very small minorities were far more likely to speak in the unanimous rule juries.

It is possible that the environment or "social climate" of deliberation may also have an effect on the participation of minority groups. Hastie's study found that the atmosphere in the majority rule juries tended to be quite adversarial, while the unanimous rule juries were more deliberate and laborious in their task. The study suggested that:[70]

> Larger factions in majority rule juries adopt a more forceful, bullying persuasive style because their numbers realise that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members.

Cornish has summed up the dilemma in these words:[71]

> The real strength of the case against the majority system lies in the possibility of a jury in which only one or two members can see a real obstacle to conviction, but the majority is unable to appreciate the force of their objection.

He has suggested that the problems arising from hung juries may be more successfully addressed if it were possible to ascertain whether vital points made by the defence were being ignored by all but the small minority.[72]

VII: SHOULD JURY DELIBERATIONS CONTINUE TO BE KEPT SECRET?

From the research discussed, it is clear that juries do not always hang because of uncooperative jurors. The reasons for the deadlocks are extremely varied. A major contributing factor appears to be difficulties within the case itself.

New Zealand has no statutory law enforcing jury room secrecy. There has, however, been a clear message from the country's superior courts in recent times that the sanctity of the jury room is to be preserved at all costs. In *R v Papadopoulos*,[73] a juror made an affidavit after the jury was discharged, stating that the verdict was not unanimous and that she had in fact dissented. The jury had deliberated for some eight hours and had returned to the court deadlocked. The judge then instructed them very clearly as to the unanimity requirement and the desired result of a collective verdict. The juror in question had shown no signs of

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68 Ibid, 166. The same situation occurred in the second Plumley Walker trial.

69 Ibid, 119.

70 Ibid, 112.

71 Cornish, supra at note 36, at 259.

72 Ibid, 260.

73 [1979] 1 NZLR 621.

dissent when the final verdict was announced. The Court of Appeal dismissed any suggestions that the affidavit should be allowed and that a retrial should take place. The position was made quite clear by Cooke J:[74]

> For centuries the courts have declined to receive affidavits from jurors purporting to disclose what took place during their deliberations in the jury room or jury box. The rule dates from at least the time of Lord Mansfield CJ, who would not look at an affidavit of two jurors swearing that the jury were divided and reached a verdict by tossing up.

The Court of Appeal's reasoning was based on the desire for free and frank discussion by the jurors in reaching their decision. The Court believed that jurors would be distracted from doing their duty conscientiously if any of them were free to publicise their own versions of the deliberations after they were discharged.[75]

The rule was reiterated in *R v Coombs*[76] and *R v Norton-Bennett*[77] when jurors again sought to give evidence about how the jury went about their deliberations. In the latter case, the juror was unhappy with the verdict and wished to share her concerns with the Court, and thus the public. This was rejected on the basis of the *Papadopoulos* decision, the Court deciding that the finality and secrecy of the jury room was paramount.[78]

The problem arose again in late 1991 when an Auckland radio station contacted eight of the twelve jurors who had served on the *Tamihere* trial almost a year before. The interviews were conducted shortly after the finding of one of the bodies of the Swedish tourists Tamihere had allegedly murdered. One of the jurors expressed his concerns about the verdict as a result of the body being found, indicating that he had lost sleep ever since then and was now not sure whether the verdict was correct.[79] The interviews caused quite a stir in the media, with neither the Minister of Justice nor the Solicitor-General being able to confirm or deny whether the actions of the radio station were contempt of court. A comment in the New Zealand Law Journal expressed the common sense approach to the problem:[80]

> It will be an extraordinary development if the Courts will refuse to consider affidavit evidence on jury deliberations, but the media are going to invade the jury room, retry the case, and in effect try the jurors at the same time.

A former President of the New Zealand Court of Appeal, Sir Alexander Turner KBE, also believes that the secrecy must remain. In an article discussing a criminal trial in which the jury members were individually polled by the judge because of the judge's desire to ascertain whether the verdict delivered by the presiding juror was in fact unanimous, Sir Alexander pointed out the dangers of allowing polling

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74 Ibid, 626.
75 Ibid.
76 [1985] 1 NZLR 318 (CA).
77 [1990] 1 NZLR 559.
78 Ibid, 567.
79 *New Zealand Herald,* 24 October 1991, section 1, 1.
80 Downey, Editorial "Juries at Risk" [1991] NZLJ 425.

to become a frequent occurrence.[81] He believed any use of it, except in the most exceptional circumstances, would result in the police pushing for the 10:2 majority verdict. According to Turner, the assurance the law gives to juries that their individual involvement in the deliberations will not become the subject of public investigation is a rare source of comfort to them.

In the United Kingdom, the issue was resolved by the enactment of the Contempt of Court Act 1981. Section 8 of the Act makes it an offence to "obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations". The provision was enacted as a result of *Attorney-General v New Statesman and Nation Publishing Co Ltd*,[82] where an action for contempt was brought against the *New Statesman* magazine for publishing an account of what passed in the jury room during the trial of the politician Jeremy Thorpe. The main purpose of the article was said to be to inform prospective jurors as to what they could expect when they found themselves in the jury box. Contempt was not found in the case but some very strong statements were made by the bench, particularly Lord Widgery CJ, who commented:[83]

> Serious consequences may flow from an approach to a juror, particularly after a trial which has attracted great publicity, followed by the publication of an account of what the juror had said about the discussion in the jury room. If not checked, this type of activity might become the general custom.

The charge brought by the Crown in the case of Thorpe was one of conspiracy to murder. The jury deliberated for two days, with the Director of Public Prosecutions later justifying the charge brought with the length of the jury deliberation. The *New Statesman*'s subsequent interview with one of the jurors caused a revelation when it was discovered that the Crown's charge of conspiracy to murder had in fact never made an impression on the jury at all.[84] After an hour's deliberation, the jury had decided by a clear majority of 11:1 that the charge should be thrown out. They had thought that Thorpe was guilty of conspiracy, but the Crown's ill-judged decision to include the word "murder" on the charge sheet resulted, eventually, in a total acquittal. The two days behind the jury room door were passed in the company of a lone juror who was holding out for conviction. Despite this problem, the entire jury struggled with the idea of returning a not guilty verdict when they all felt Thorpe had been involved in conspiracy in some way and should not be allowed to get off scot-free. The jury had felt obliged to return a unanimous verdict because of the trial's publicity, despite their easy option of returning a majority verdict within the first few hours. Their task was made unnecessarily difficult, however, by the charge brought by the Crown.

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81 Turner, "Polling the Jurors" [1979] NZLJ 155.

82 [1981] 1 QB 1.

83 Ibid, 9.

84 Chippendale & Leigh, "Thorpe's Trial: How the Jury Saw It" (1979) 98 *The New Statesman* 120.

The information gleaned from this interview proved to be of extreme interest to many involved in jury research. The enactment of s 8 of the Contempt of Court Act has silenced that insight, with all publications now having to be censored to such an extreme that no real insight into the deliberations of juries is available.

It is of real significance that all of the reforms of the jury system carried out in the United Kingdom in recent years have been done without the benefit of jury research. For example, the majority verdict was introduced in 1967 to eliminate nobbled and recalcitrant jurors. The Criminal Justice Act 1988 raised the age limit for jurors from 65 to 70, in the hope of countering what was thought to be recklessness by the younger jury members. The removal of the peremptory challenge in the same Act was designed to prevent abuses of the system by the defence. As was pointed out in a recent editorial, these changes have occurred when "there is no accurate information as to whether it was needed or merely resulted from little moral crusades from parties who were interested in securing convictions".[85]

These two examples illustrate that not all deliberations are totally rational. Due to the difficulties in obtaining this sort of information, it is not possible to ascertain how frequently these behaviour patterns occur in New Zealand jury rooms. Some insight into jury deliberations may reveal the extent of such behaviour. Academic research, if conducted in such a manner that would ensure that the trial itself remained confidential, would provide much-needed information on the workings of the jury and the types of behaviour demonstrated.

VIII: THE FUTURE OF CRIMINAL JURY VERDICTS IN NEW ZEALAND

The issue of whether New Zealand should follow other jurisdictions in introducing the majority verdict was last examined in the report of the Royal Commission on the Courts in 1978. Statistics provided to the Commission by the Department of Justice showed that where the first trial resulted in a hung jury, over half of the retrials resulted in a finding of not guilty. It was clear that the records did not show whether the disagreement was the result of juror intransigence or of a genuine division of opinion.

Submissions were made by the police in favour of a change to majority verdicts, and these were supported by the New Zealand Law Society which stressed that a majority verdict should also work for an acquittal.[86] The reason for the provision for acquittals as well as convictions was to prevent an expensive second trial taking place when it was clear that the Crown had not proven its case.

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[85] Morton, Editorial "Repeal the Contempt of Court Act" (1990) 140 New LJ 1257.

[86] New Zealand Royal Commission on the Courts (1978) 114; Peter Williams QC has stressed that any change to the system should only work in favour of an acquittal, with deliberation being allowed to continue for a minimum of three hours. After that the judge should have the power to allow an acquittal if the majority (10 or 11) are in favour of it — see *Auckland Star*, 27 March 1991, section A, 5.

The Commission concluded that the unanimity requirement should remain but that if, in the future, there was proof that organised crime in New Zealand was inducing jurors to hold out for not guilty verdicts, the issue should be re-examined. They suggested that the jury selection procedure be made more effective, especially in regard to the challenge process.[87]

In his detailed analysis of jury verdicts, Downie suggested that perhaps the answer is to do away with the right of peremptory challenge altogether.[88] It is possible that such a reform may lead to a real random jury being selected and would give more weight to the theory that all members of the community are represented in the courts. As has already been outlined by example from the Plumley Walker trial, certain groups of the community are challenged very frequently. Both the prosecution and defence are forced to work with a limited amount of information about the group assembled before them on Monday mornings. As a result, they eliminate any person who they feel may represent some sort of risk.

It is submitted that deadlocked juries occur predominantly because of unclear directions from the judge during the summing-up, a problem which may be exacerbated by the Crown making ill-judged decisions regarding the charges brought against defendants. Jury disagreements are relatively infrequent when considered in the full context of criminal trials. The real problem requiring attention is the amount of retrials that occur due to judicial misdirection, or from ambiguous communications between the judge and jury.

Directions from the judge are especially important in controversial and highly publicised cases such as the Plumley Walker trial. Indeed, the main reason for the first trial going to appeal was on the basis of misdirection. It was this appeal that resulted in the second and third trials and the subsequent increased expense to the taxpayer. The problems of the case were escalated by the Crown's choice of wording in the charges brought against the accused.

The indictment stated that the two accused had, on 28 January 1989, at Taupo, murdered Peter Plumley Walker. The Crown opened the case in accordance with that count but when closing their case to the jury, the prosecution provided an alternative scenario, that the deceased's death may have actually occurred at Auckland. In his directions to the jury the Judge said:[89]

> All 12 of you must agree, guilty or not guilty, but it does not mean that you must all arrive at your determination in the same way, so long as you arrive at the same determination. If, for example, one of you may say 'Well I believed Witness A. When I was considering the evidence against Renee Chignell, she appeared to me to be a person who was telling the truth, and that convinces me of this or that.' Another one of you may say 'I was not too sure about Witness A but when I heard Detective Sergeant Dewar, what he said, that brought me finally to the conclusion that I have come to.' You are 12 individuals. You will necessarily think in different ways and you do not have to

87 New Zealand Royal Commission on the Courts, ibid, 116.

88 Downie, supra at note 39, at 494.

89 Supra at note 1, at 264.

> take the same steps along the path that will lead you to your conclusions one way or the other. So long as you arrive at the same conclusion, that is all that is needed.

The Court of Appeal found that this direction may have confused the jury. The first example related to murder at Taupo, the second to murder at Auckland. No further direction was made to the jury that they had to be unanimous as to which scenario they agreed upon.

The Crown's indictment was a problem in itself. It did not present alternative counts of murder. In its summing-up, the Crown's alternatives were separated by place and time, and were wholly different acts which possibly involved different intents. The result of this was the inevitability that those jurors who favoured death at Taupo must have disagreed with the jurors who favoured death at Auckland. Had the indictment presented alternative counts of murder, one at Taupo and one at Auckland, there would have been no ambiguity in the directions to the jury.

The issue in the third trial was not simply whether the two accused had murdered Peter Plumley Walker. In order for the charge of murder to be proven, it was necessary for the jury to unanimously agree on three points:

(i) that the defendants threw Plumley Walker's body over the Huka Falls;
(ii) that they knew he was alive when they did it; and
(iii) that they intended to kill him.[90]

Clearly, directions to juries on the requirement of unanimity are as difficult as those where a majority verdict is allowed. Another example of the problem of inadequate direction was in *R v Patterson*,[91] where the trial judge had included the following statement in his summing-up to the jury:[92]

> I do not suggest that if any one of you holds a firm view he or she should be readily persuaded to do something that he or she thinks is wrong. Indeed, none of you should arrive at a verdict which he or she thinks is wrong. But there must be discussion amongst you and the view, in the end, has to be a consensus view and so *that involves deferring to the views of others*. [Emphasis added.]

The Court of Appeal held that the words of the learned Judge may have encouraged an individual juror to surrender his or her reasoning to others. In discussing

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[90] In the third trial, Anderson J directed the jury on this point in those words. In describing the requirements of murder, he said the jury must be unanimous that each of those ingredients was proven beyond reasonable doubt, and that the jury must all arrive at the same destination. His Honour described beyond reasonable doubt as not a silly or fanciful doubt, but a high standard. It required the jury to be sure so that no reasonable doubt remained in its mind. He went on to say that if the doubt was found to exist, the jury's duty was to acquit, and that this standard was a fundamental protection for persons in the community. It should be noted that the writer was given permission by his Honour to take notes during the closing addresses of the Crown and defence, and also during his Honour's summing up.

[91] [1980] 2 NZLR 97 (CA).

[92] Ibid, 98.

the requirements of unanimity, Chilwell J said:[93]

> The unanimous verdict of a jury in a criminal trial involves something more than twelve jurors being of the one mind or opinion, it requires like-mindedness on the part of each of the twelve jurors. In this case 'consensus' may have meant 'agreement' for individual jurors. But an agreement which is arrived at by deferring to the views of others is not necessarily one which is arrived at by like-minded people who have reasoned their way to a common result.

The importance of judge direction in the case of deadlocked juries was discussed by Richard Meeker in his paper on the trial of Juan Corona, who was found guilty of twenty-five charges of murder in California in 1973.[94] The jury deliberated for one week before finally agreeing on the guilt of the accused, but had been divided from the outset of deliberations, initially favouring an acquittal. The judge kept them deliberating until unanimity was reached. The first deadlock occurred on the fourth day of deliberations, with the presiding juror telling the judge the vote stood at 8:4, while (correctly) not indicating whether the majority favoured acquittal or conviction. The judge sent the jury back to deliberate further.

The following day the jury returned to the courtroom, only to announce that they were split 11:1. They asked the judge to re-read his instructions on reasonable doubt, which he did, before sending them back to deliberate. The instructions read out included the following:[95]

> It [reasonable doubt] is that state of the case which, after the entire comparison and consideration of all evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Two days later the jury returned a guilty verdict on all twenty-five counts. Later, one of the jurors announced that she was not pleased with the verdict. She stated that she had been the lone juror holding out for the last two days on the grounds that she still had doubts about Corona's guilt. The other jurors had shouted at her, saying these were only "possible" doubts.[96]

Fundamental to the trial was the judge's instruction to the jury on reasonable doubt at the time of deadlock. Judge Patton only told them that a reasonable doubt had to be fairly substantial. It is possible that this lack of clear direction had the result of turning an originally 7:5 verdict favouring acquittal into one that unanimously voted guilty. Meeker's solution to the problem of judge direction is an interesting one, simply because it approaches the issue so uniquely. He suggests that once the presiding juror announces that the jury is deadlocked, the judge should ask the presiding juror whether a majority favours conviction or acquittal. If the majority favours conviction, or is evenly split, the case should be declared a mistrial. If not, the judge should direct the jury to continue deliberations for a reasonable period and make it clear to them that there will have to be a retrial if

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93 Ibid, 101.

94 Meeker, "Instructing Deadlocked Juries in Light of the Trial of Juan Corona" (1974) 53 Oregon LR 213.

95 Ibid, 222 per Judge Patton.

96 Ibid.

they fail to acquit.[97]

Meeker's reasoning is stated as follows:[98]

> When a judge tells a deadlocked jury whose majority favours conviction to keep trying, even though they have been unable to achieve a verdict after a good faith effort, the jury is being influenced or directed in a fashion which violates the defendant's right to proof beyond a reasonable doubt. The judge is coercing the jury.

Appealing as this solution may seem, it is submitted that sending the jury back to argue for acquittal is also coercive. Polling jurors in public is not a desirable outcome. It will only lead to jurors feeling more pressured to agree with the majority faction.

Unfortunately, the writer has had no access to the directions from the judge to the second Plumley Walker jury, either generally or at the point of deadlock. Consequently no comment can be offered in regard to that direction. It is of significance, however, that ex-jurors and counsel present at the third trial commented that the directions made in that trial were much clearer and fairer than those of the second trial.

IX: CONCLUSIONS

Before any reform to the jury system is considered by the legislators, further research into jury deliberations must be encouraged. The most realistic means of achieving this will be to allow academic access to the jury room itself by conducting confidential interviews with jurors after the trial.[99] The information already gained from the studies completed and the articles published has been invaluable, demonstrating that any controversy arising from hung juries is usually completely misunderstood by the legal profession, police and public alike.

The problem of retrials does not lie with the jurors but with the judicial system itself. The issue of whether eight, ten or twelve jurors should determine the guilt or innocence of the accused is secondary to the real problem of how best to correct the misleading directions given so frequently to juries in the course of a trial. Three specific problems need to be addressed before New Zealand considers any change to the jury system:

(i) the lack of juror training for the task which confronts them at short notice;
(ii) the inconsistent definitions of the standard of proof beyond a reasonable doubt offered by lawyers and judges alike in the course of a trial; and
(iii) the often confusing effect of the judge's directions to the jury, particularly in the summing-up phase of a trial.

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97 Ibid, 223.
98 Ibid, 224.
99 This has recently been suggested in the United Kingdom: see (1990) 140 New LJ 1257.

Some ex-jurors have stated that they do not feel that any training is needed for the task and that jurors tend to approach the task honestly, using their common sense. It seems appropriate, however, to allow a short break between the jury selection procedure and the start of counsel submissions. This would allow the jurors time to absorb the full impact of their task, making it more likely that their minds will be properly focused when the case begins.

The second issue is also one deserving a specialised study. Jurors are repeatedly briefed on the standard of proof beyond reasonable doubt. Judges and lawyers alike struggle to explain this concept simply and usually manage to do so in several different ways in the course of a trial. The research discussed has indicated that jurors are often unclear as to exactly when to apply the standard of proof and, in some cases, never discuss the standard at all. It is apparent that reformers need to address the question of whether the various explanations are needed at all and whether the standard should simply be mentioned to the jury and left to them to interpret.

The third issue is the one requiring the most attention if any reform is to be considered. Jurors are told that they are the judges of fact and that questions of law are for the judge to determine. Unfortunately, it appears that many jurors do not really understand the difference between fact and law.[100] One juror who published her account in the United Kingdom suggested that the judge's directions regarding the law in the case be given to the jury on paper. She said:[101]

> This is the area where the jury should not make its own decisions but should follow guidance, and unclear or inaccurate recollection of that guidance must lead to unreliable decisions by the jury.

The insights to the jury system discussed in this article have made it quite clear that there is a chasm existing between the judicial system itself and the jury. Directions from the judge in the summing-up phase are often far from clear. Jurors rely heavily on these directions in their deliberations. If deadlocked juries are to be avoided, juries must be directed to discuss the evidence before taking a vote on the verdict. Hastie's study has indicated that a failure to direct in this manner may result in much of the relevant evidence never being fully discussed. If a small minority forms very early in the deliberations, it is possible that they may never contribute to the deliberations if the initial ballot is taken too soon.

Hung juries, when they occur, will not be solved by making the burden easier for the Crown through the introduction of a majority verdict. Anything less than a unanimous verdict breaches the fundamental principle of criminal law that a defendant is innocent until proven guilty beyond reasonable doubt.[102] A majority verdict ensures that much of the crucial evidence presented in court will never be

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[100] See Darbyshire, supra at note 26, at 1265.

[101] Hodgetts, "A Systems Analyst on a Jury" (1990) 140 New LJ 1269.

[102] A principle which is now incorporated in the Bill of Rights Act 1990 s 25(c), and is stated as a minimum right.

discussed by the jury at all. The danger of this is that the most fundamental issues of the trial will never be addressed in the jury room as the deliberation is likely to end as soon as the required quorum is met.

The first major study of juries, conducted by Kalven and Zeisel, suggested that the most likely reason for a hung jury was a response to genuine difficulties in the case, and that this may be a reflection on the clarity with which the issues of fact and law are submitted to the jury.[103] Any future reforms must address this problem first: changing the jury verdict will not change the inconsistencies of the judiciary.

[103] Supra at note 3, at 201.