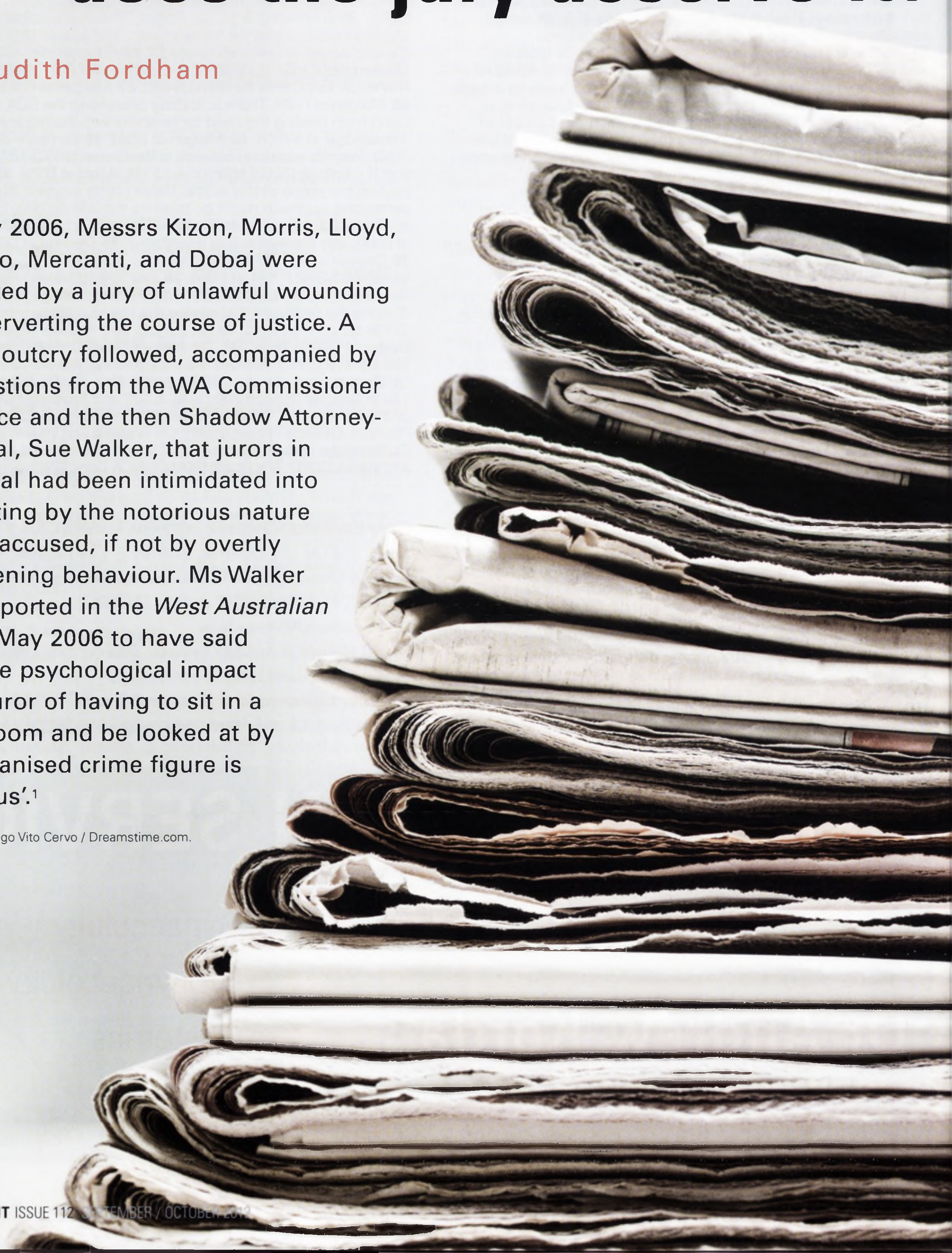
BAD PRESS: does the jury deserve it?

By Judith Fordham

In May 2006, Messrs Kizon, Morris, Lloyd, Martino, Mercanti, and Dobaj were acquitted by a jury of unlawful wounding and perverting the course of justice. A public outcry followed, accompanied by suggestions from the WA Commissioner of Police and the then Shadow Attorney-General, Sue Walker, that jurors in that trial had been intimidated into acquitting by the notorious nature of the accused, if not by overtly threatening behaviour. Ms Walker was reported in the *West Australian* on 19 May 2006 to have said that the psychological impact on a juror of having to sit in a courtroom and be looked at by an organised crime figure is 'obvious'.[1]



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Also in 2006, twelve jurors found three Western Australian men guilty of the murder of Phillip Walsham. The case featured in an ABC *Australian Story* three-part series, 'Beyond Reasonable Doubt'. In 2007, the Western Australian Court of Appeal quashed the convictions of the men who were serving life jail terms, finding that the verdict was 'unreasonable and cannot be supported on the evidence'.

A media storm followed, with suggestions that the jury could only have reached its verdict by speculation or as a result of prejudice.

These cases are only two of many where calls have been made to scrap the jury system and replace it with something else. Anecdotal horror stories abound. Are these stories typical of what happens in the jury room? Do juries deserve the type of criticism they have received? Should the system be scrapped or reformed?

Reform suggestions have included:

- Have one judge or a panel of three judges assess the evidence, consider and deliver a verdict.
- Have the judge retire with the jury to assist and guide deliberations.[2] Although one can see the merit in professional guidance and facilitation, this suggestion has met with little support as it is thought a judge might wield too much power and have a disproportionate influence on the decision-making process.
- Use a juror guidebook,[3] offering written assistance in selecting a jury foreman, discussing the evidence and the law, voting, getting assistance from the court, the verdict, and dealing with feelings once jury duty is over.
- Use a trained jury facilitator to assist with structuring discussions, reaching consensus, ensuring that all jurors are heard, minimising inappropriate pressure in the jury room, voting and communicating with the court.

In response to media criticism of the jury system in 2006, then WA Attorney-General, Jim McGinty, said: 'We must ensure that changes to the jury system, which has been in place for hundreds of years, are made on the basis of research and fact, and not on the basis of emotion and prejudice.'[4]

Permission has been given by past attorneys-general of WA for our team at the Jury Research Unit to interview jurors after criminal trials. Three projects have been undertaken (looking at jurors and expert evidence, intimidation and the whole jury experience), and this article discusses some of the findings that may shed light on whether the jury deserves the bad press it has received from time to time, and what might be done to resolve some of the issues.

EXPERT EVIDENCE

The purpose of the *Jurors, Juries and Expert Evidence Project* is to learn more about how real jurors and real juries assimilate, evaluate and use expert testimony, in order to provide a basis for practical, sound proposals about ways to improve the manner in which expert testimony is communicated to juries in Australia.

Following a series of jury trials involving complex expert evidence, a short questionnaire was completed in the jury room seeking non-identifying demographic details, subjective impressions of the expert evidence, ease of comprehension and general comments about the juror's experience. Respondents were invited to take part in a later semi-structured interview canvassing issues such as:

- the manner of presentation of the evidence and the effect this had on individual understanding;
- what presentation methods are most effective;
- alternative methods of presentation;
- the individual and group deliberative process as it related to understanding, integrating, evaluating, weighing and applying the evidence; and
- the effect of the introduction of an opposing expert.

Data collection, quantitative and qualitative analysis are now complete. A preliminary report has been published, and presentations made, with final analysis on hold due to the intervening *Jury Intimidation Project*.

INTIMIDATION

In the *Jury Intimidation Project*, almost 3,000 (2,954) jurors from random and targeted[5] trials were sent a 24-page questionnaire. We received 969 completed questionnaires and, of those, 501 jurors consented to an interview. Of those, jurors who had expressed any experience that could be interpreted as intimidation, no matter how minor, were interviewed, as were their fellow consenting jurors.

There was intimidation in some trials from the accused, his or her supporters or from the victim or his or her supporters, but this was by no means a common finding. The incidence of intimidation was found to be considerably less than the media would lead us to believe, came from some unexpected sources, and mostly did not affect the verdict. In *most* instances, jurors were not influenced by the intimidation into voting in a different way from that which their dispassionate consideration of the evidence would dictate.

The most frequent incidents of intimidation were at the hands of the accused. A common form of intimidation was being 'eyeballed' by the accused, victim, family and friends of the accused, family and friends of the victim, as well as by members of the public gallery.

Jurors reported being intimidated by the emotion expressed by the accused and the victim during court proceedings, as well as the conduct of the defence lawyer.

While jurors also felt intimidated when they encountered members of the public gallery or people involved in the trial outside the court, there is little evidence that this type of intimidation influenced a juror's deliberation or verdict.

However, intimidation from within the jury (that is, from other jurors) appears to be the most influential form of intimidation, as eight out of the eleven instances of reported intimidation or bullying from fellow jurors resulted in a juror changing their vote. These jurors later regretted changing their votes.

Intimidation experienced from defence lawyers also had an influence on decision-making, with three out of six reported instances of intimidation affecting the decision-making process of jurors.

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> Solutions to problems associated with jury deliberations include providing adequate information to juries, education on group decision-making processes and basic functional guidance on how jurors can best perform their role.

When jurors reported their impressions of their fellow jurors' experiences, intimidation from other jurors was again the most common. Of the 16 cases of intimidation that other jurors reported, 12 of these incidents resulted in a change to a juror's deliberations and vote. Jurors also reported that other jury members experienced intimidation from the accused, family of the accused and the victim, but these incidents were less frequent than the intimidation from other jurors. Jurors also reported two incidents in which they believed another juror was intimidated by the judge, and in both cases they believed that the intimidation influenced the juror's decision-making process.

It is of concern that the most effective form of intimidation (in the sense that the intimidation caused a vote other than that which a juror's conscience and reasoning would dictate) was from other jurors. Given the inability to challenge by way of appeal anything that happens during deliberations within the confines of the jury room, an option which could seriously be considered would be to engage a professional, non-voting facilitator, whose role would simply be to ensure that deliberations were conducted in an ordered, non-threatening way.

This report was completed, but the then WA Attorney-General, Christian Porter, decided that he lacked the capacity to approve its release insofar as there was any reference to jury deliberations. A heavily redacted version[6] appears on the website of the Department of the Attorney-General. As Western Australia has recently had a new attorney-general appointed, a fresh attempt will be made to have the report published in full, along with other publications extracted from the data contained in it.

THE JURY EXPERIENCE

From the moment people receive their jury duty summons, to leaving the court after the trial is over – and beyond – jurors have volunteered a broad spectrum of information and important insight into their experience and the justice system.

We can make comments on many of the issues that have been raised in the 'bad press' juries have received, but a full exploration of the mountain of information must await the outcome of funding applications and permission of a progressive attorney-general. The amount of information offered has vastly exceeded our predictions. The response rate of well over 30 per cent in a project requiring completion of a 24-page questionnaire, and the willingness of well over half of these jurors to participate in an interview, as well, indicates the strength and depth of feeling of these volunteers.

Traditionally, Australian courts have considered the deliberation processes of juries as completely autonomous and have been reluctant to interfere with the dynamics that occur within the jury room. Consideration of the findings from the *Jury Experience Project* aims not to threaten the autonomy of the jury, but to consider whether there are skills or structured guidance that can be provided to jurors in order to manage the group process and assist in decision-making.

The information we have thus far derived from all three studies indicates that there are potentially soluble problems that arise throughout the trial and inside the jury room. There appears to be a range of issues associated with jury deliberations that may have inexpensive and non-invasive solutions.

Most relate to the (in)adequate provision of information to jurors, education on group decision-making processes and provision of basic functional guidance to jury members on how they can best perform their role as a juror. Possible solutions would not attempt to dictate how juries should reach their decisions, but aim to eliminate some of the fundamental problems which result in hung juries, inattentive or disengaged jurors, juror dissatisfaction and discomfort with their verdict, any or all of which may indicate that justice has not been served.

SOME SPECIFIC BAD PRESS

The jury was prejudiced

Jurors do hold preconceived ideas. These include opinions about:

- drug users and their behaviour (liars, thieves);
- drug dealers (how they should be locked up and kept away from our children);
- Aboriginal people and their behaviour (drinking, beating their spouses);
- young people and their behaviour (king-hit);
- women and their behaviour (sleeping with several men);
- high-profile 'criminals' (he's guilty of other things, so he's guilty of this);
- defendant looks like a stereotypical criminal (looks like a drug dealer, or a paedophile); and
- reverse racism – where the jury discuss 'making sure they get it right' *because* the defendant is Aboriginal.

The media suggests that these prejudices influence the decision-making process and the verdict. However, our data suggests otherwise. When jurors have said that prejudices were expressed, we asked them to explain who expressed them and how the matter was dealt with.

Jurors will identify prejudice within themselves, and direct

themselves to put their prejudices aside and concentrate on the facts. They discuss their (and others') prejudices before moving on to study the facts and evidence.

Often, during the trial on breaks and/or during the deliberation, one or two or more jurors will express prejudices, towards the accused or alleged victim. Then, those less likely to have these opinions identify and argue against these prejudices, and assert to the group that they are there to scrutinise the evidence and not to take into consideration such opinions and beliefs.

The jurors ignored the evidence and were influenced by the media

We found almost no evidence of any media influence, whether the trial was a targeted (where intimidation was rumoured) trial, or a randomly selected trial.

Jurors just want to go home

We consider this to be a significant issue that requires attention. There were quite a number of reports of jurors and juries in real difficulty as a consequence of this problem. Possible solutions could include not sending a jury out on a Friday afternoon, having them keep strict 9–5 hours, the use of a facilitator to encourage jurors to keep on task and to make deliberations more efficient and therefore shorter, and better education and guidance before jury service.

Juries are not convicting due to the 'CSI effect'

The media, and lately academic commentators, are starting to discuss the existence of a supposed 'CSI effect'.[7] This is the belief, usually based on nothing other than anecdotal evidence, that jurors will demand scientific testimony, acquit (wrongly) if it is not made available, be unduly influenced by it, be unable to understand or evaluate it, and will be influenced by the most articulate expert.

Others consider the competence of juries to be considerably underestimated.[8]

Our *Expert Evidence Project* is producing encouraging, though sometimes mixed, messages about the so-called 'CSI effect'.

We found that jurors are alive to the possibility that more evidence could have, or should have, been made available to them. The missing information was usually, on our analysis, available and logically relevant. For example, one juror said:

> 'We were so upset that… they never did the nail scrapings. It leaves us jurors thinking "why not?"… on TV they say that they can get DNA… There was all these questions that we asked. Even though we know we're not meant to, we still ask ourselves that in the juror's room… it was such a hard case anyhow, but we thought "oh well, if they've got DNA we'll be fine. It will just give us the answers… if he had DNA under his fingernails because of the fighting… belonging to someone else, then we're going to know…"'

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A strong theme emerging is that jurors are very careful to not just accept expert evidence at face value, but to see what other aspects of the evidence support or contradict the expert evidence, and assess evidence on that basis. They are also conscious of which witnesses are independent and ascribe more weight to their evidence, all other things being equal. This is a powerful factor in assessing expert testimony.

On the other hand, our findings suggest that even though jurors are alive to the possibility of unconscious or conscious bias in experts, they still give their evidence more weight, at least initially, compared to that of lay witnesses.

Despite judicial instructions to the contrary,[9] we found that some jurors carry out their own investigations.

WHAT MIGHT HELP JURORS?

Some suggestions were made consistently by jurors.

Taking notes

Note-taking by jurors in Western Australian courts is now commonplace, as opposed to some other jurisdictions.[10] This was positively viewed by jurors; however, they consistently volunteered that they would have liked clear guidance early in the trial, particularly as to the law,[11] but also as to the factual issues. Instruction as to the law applying to the particular trial (as opposed to general instructions about such matters as burden of proof) is rarely given in Australia.[12] A partial solution, at least in relation to the facts, may lie in advocates appreciating this concern and dealing with it in their opening addresses.

'I wish I had taken more [notes]... I wish that had been stressed to us more because when they say you've got, I think they had 72 witnesses – you don't think about it at the beginning but when we got to about witness four or five and we were having a hard time remembering what number one said, I went "oh my gosh, I'd better start writing" and that's when I started writing. Then when we got to the juror's room and we needed to know things, it was like "please did someone write out those first few?" That's when we realised how important it was...'

The ability to ask questions of the experts

Judges do not encourage jurors to ask questions generally, and to the author's knowledge never of expert witnesses.[13]

'... [W]e had, just a particular question just wasn't answered... We actually raised it a couple of times, 'can we pass a note to the judge to get him to ask the questions' and we were told "no".'

'Say ... the first day of a six week trial ... the jury gets fully informed ... and at that time if the person running that says, "Now there is an opportunity for the jury to put questions to certain key people, being [the experts] and you will be given an opportunity to ask them questions after the prosecution and defence have finished their cross examinations"... What that will do is it will make the jury more involved ... [T]hey will then automatically want to participate more because you feel almost not an outcast, but you're sitting there, you have to make a judgement but you can't say anything really.'

Our research supports the existence of a 'tech effect', in the sense described by the Michigan researchers.[14] Dissemination of technical knowledge packaged for the popular market is greater than ever before and jurors are increasingly imbued with the willingness and skills to come to grips with technical and scientific evidence. It is the responsibility of the criminal justice system to recognise this change as one that will enhance the dispensation of justice, and to take advantage of and encourage it, by making changes in modes of presentation of evidence, and improving the technical and scientific knowledge of all 'players' in the system: judges, counsel, courtroom architects and prosecuting agencies. ■

Acknowledgements: The support of the two most recent Attorneys-General of Western Australia, the Chief Justices (immediate past and present) of Western Australia, the Chief Judge of the District Court of Western Australia, the Western Australian Sheriff's Office, all the judges whose courtrooms were invaded and, most of all, the jurors is gratefully acknowledged, as is the financial support of the University of Western Australia, WA Police, Legal Aid WA, the Office of the Director of Public Prosecutions, the Law Society of Western Australia Public Purposes Trust and the Department of the Attorney-General.

Notes: **1** See Parliament of WA *Hansard*: Thursday, 18 May 2006. Ms SE Walker: 'For Mr Mercanti and Mr Kizon in particular, because he is notorious, to sit in a courtroom and study the jurors' faces in detail would cause the jurors some apprehension... Presently, the psychological impact on the jurors is immense. A study is not needed to determine that; it is commonsense.' **2** The Hon Wayne Martin, 'Current Issues in Criminal Justice' (2009) *Rotary District Conference*. Perth: Burswood Convention Centre. **3** R G Boatright and B Murphy, 'How Judges Can Help Deliberating Juries: Using the Guide for Jury Deliberations' (1999) *Court Review*, 38-45. **4** Parliament of WA *Hansard*: Thursday, 18 May 2006. **5** Targeted trials: trials where it has been suggested or suspected that jury intimidation has occurred. Note that the questionnaire was oblique in its approach and that the word 'intimidation' was not used, as we did not want to influence the responses at all. **6** http://www.department.dotag.wa.gov.au/_files/juror_intimidation.pdf **7** DE Shelton, YS Kim, G Barak, 'A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the '*CSI* Effect' Exist?' (2006) 9(2) *Vanderbilt J of Entertainment and Tech Law* 331-67. DI Lehman, RO Lempert, et al, 'The Effects of Graduate Training on Reasoning: Formal Discipline and Thinking about Everyday-Life Events', (1988) 43 *American Psychologist* 431-32. MB Kovera and BD McAuliff, 'The Effects of Peer Review and Evidence Quality on Judge Evaluations of Psychological Science: Are Judges Effective Gatekeepers?', (2000) 85(4) *Journal of Applied Psychology* 574-86. **8** G Edmond and D Mercer, 'The Politics of Jury Competence', in B Martin (ed), *Technology and Public Participation*, (Wollongong, 1999) 85-112. **9** JRP Ogloff, J Clough, and J Goodman-Delahunty, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Melbourne, 2006). **10** IA Horowitz and L ForsterLee, 'The Effects of Note-Taking and Trial Transcript Access on Mock Jury Decisions in a Complex Civil Trial', (2001) *Law and Human Behaviour*, 373-91. **11** In this regard, see MJ Bourgeois, IA Horowitz et al, 'Nominal and Interactive groups: Effects of pre-instruction and deliberations and evidence recall in complex trials', (1995) 80 *Journal of Applied Psychology*, 58-67. **12** J Ogloff, J Clough and J Goodman-Delahunty, note 13 above. **13** *Ibid*. **14** DE Shelton, YS Kim, G Barak, note 9 above.

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