The Jury Writes Back : Aspects of Jury Management

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"I'll be the judge, I'll be the jury" said cunning old Fury: "I'll try the whole cause and condemn you to death"

Charles Dodgson (a.k.a. Lewis Carroll): Alice in Wonderland

His Honour: Madam, I see that your confinement is very near. I'll excuse you from jury service.

Juror: I'm not pregnant.

Transcript (a nameless trial in regional Queensland)

We now have a lot more than anecdotal evidence of the way in which juries perceive and understand the trial process, particularly the directions and observations contained in the summing up. When I commenced practice in 1971, the only reliable source of information about the jury process in Queensland was the gathered company at the bar of the old Grosvenor Hotel in George Street. The heady mix of tipsy barristers, solicitors and journalists who gathered in that esteemed place after Court, provided a rich lode of inside information from the jury room. It was also a reliable source of feedback about the behaviour and habits of Judges in Court.

We Judges are unique in that we do not have any real form of peer review – who needs to sit in and listen to someone else's summing up! We hardly regard the

Court of Appeal Judges as our peers; and we know that members of the High Court are not. From the oracles in the front bar of the Grosvenor, Judges would hear, (often third or fourth hand) of behaviours attributed to them and their brothers (they were all brothers in those days!); and adjustments could then be made to eliminate bad habits and emulate the good. You know how responsive we all are to constructive criticism.

As an associate in the two years before I commenced practice, I was intrigued that the Judges gathering on Friday afternoons around the fridge above George Street to discuss war stories and triumphs of wit and eloquence, would always regard the triple or quadruple hearsay from the Grosvenor as having the force of holy writ – especially when it confirmed that silly old X was still reading the entire transcript to the jury, despite being told not to by the Court of Criminal Appeal; and Y still had that disarming habit of dozing off during Counsels' addresses.

As a reflection on the cyclical nature of life, I can report to the interstate Judges that the old Grosvenor disappeared and became – yes, a McDonalds. The warm beer and smoke encrusted wit and repertoire made way for the McMuffin and the McMuck; and although some of the old stalwarts continued to encourage their weight problem at McDonalds; many others simply faded into the night. And then miraculously, McDonalds closed down and the Grosvenor re-emerged albeit in a more hip and cool style; but still serving beer to jaded lawyers and cynical journalists.

We no longer need the Grosvenor crowd for feedback on how juries think – we are literally awash in research into jury communication from all parts of the globe, which should give us some real direction to enable us to improve our communication with the jury. We still rely heavily on the Grosvenor for feedback about our personal qualities and faults, and we still assiduously ignore the hearsay rule and the presumption of innocence.

My paper is designed to be light hearted; indeed that was my brief, but it is also a serious look at the issue of judge/jury communication during the trial process. I will look at communication in all its forms; the use of language such as sentence construction, complexity of language and phrasing, the use of written directions and computer generated images; I will even look at more unusual forms of communication – those usually reserved for the really bad Judge who disguises his or her deficiencies by singing the summing up. Others, even worse, resort to verse, but only in America!

I will touch briefly on what juries think about us, and what turns them on and what turns them off. I will even tackle that sacred cow – the interfering judge. The advocate turned judge who can’t help showing off and demonstrating his or her abilities as an advocate, especially when confronted with barristers of questionable ability. Some years ago, a judge in Queensland, who never recovered from his advocacy days, was forced to uphold an objection to one of his own questions.

I know that there is no-one in this room who has ever attempted to influence a jury to a particular verdict; so my observations are purely hypothetical. I know that you all know judges who have – but they are either outside having coffee to avoid embarrassment, retired, or on the Supreme Court.

When it comes to discussing the evidence, as Sir Patrick Devlin put it in his rather understated way in his seminal work on jury trials:

> "Some judges like to perform that task with complete neutrality; others will indicate an opinion on some of the issues or on the value of some of the evidence …"[1]

In his work on the jury, W.R. Cornish noted :

> "Judges realize their power to influence a verdict. Lord Birkett, in contrasting his work on the bench with that at the bar, confided in his diary: 'I still have the power of dominating juries; they do whatever I wish.' Glanville Williams reports: 'I was told by a recorder, who was a strong supporter of the jury system, that when first appointed he used to sum up to the jury with absolute impartiality, and the result was that the jury, being left to do its own thinking, acquitted most of the defendants. To avoid these failures of justice the recorder changed his method and summed up in the direction he thought proper. The result was the expected number of

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> convictions.' It is scarcely surprising in a system under which judges are selected exclusively from practising advocates that some judges will continue to practise the art of persuasion from the bench."[2]

The reality is that judges do have real power to influence the jury; and the research indicates that juries are influenced by the judge, even when it comes to decisions about the facts. That influence can be subtle; some might say insidious. When the words appear on paper, what does not appear to the Court of Appeal reader is the manner in which the words were delivered. Does anyone recall the "sighing" judge, who sighed contemptuously when describing some cunning defence argument with the jury, or the "theatrical" judge who, to emphasise what he thinks of a particular piece of evidence (usually from the defence), engages in face pulling, eye rolling and eyebrow raising? Of course, such judges only appear in various episodes of "Rumpole of the Bailey" and in our collective memories, and are long since retired from active service. The Australian judge is well trained in the theatrical side of judging, and would never engage in some of the cheap tactics of some of our American colleagues – the judge who got into a spot of bother for bringing his Colt 45 into Court and waving it about to emphasise a point. Of course, unless anyone said anything, and who would, the fact that he had a gun would not appear in the transcript. I will be talking about aids and props later; but firearms, except when exhibits, should be avoided.

[2] pp113-114

I think it is also unlikely that any modern judge would adopt the tactic of one of our legendary police magistrates who, to show his disgust for some argument or evidence (inevitably from the defence), would either slowly expand his braces, letting them go regularly to put Counsel off his stride, and if this failed, he would slowly thread his tie into his mouth accompanied by grunts and slurpings that would unsettle even the most stoic of advocates.

We know that juries appreciate and respect the obviously fair judge, and will not react well if it is thought that they are being patronised or undervalued.

The real challenge for us as judges is how to communicate to a jury of lay people, often quite complex legal concepts in a way that is both fair and legally accurate, and so that they understand the concepts and are then able to apply them to the facts.

The Americans have had an obsession for some time with the language of jury communication and instruction. As you know, in most if not all U.S. States, the judge is not permitted to comment on the facts. His or her task is to instruct the jury in the law. The jury research conducted in New Zealand in 1998 indicates that to a great extent, juries understood the directions given to them by the judge. Similar results came out of the research in New South Wales into the effect on juries of pre-trial publicity. A limited survey of Queensland jurors in December 1999 produced similar results. A more recent study conducted by Flinders University Academic Dr Neil Brewster seems to reach different conclusions, although my only knowledge of his research comes from a Radio National

interview. I have not been able to access the findings from his study funded by the Law Foundation of South Australia. Certainly, the U.S. research – which generally speaking is a lot more extensive – suggests that juries in the United States have a great deal of difficulty in understanding legal directions. In a comprehensive paper entitled “Reforming the Language of Jury Instructions”, Professor Peter Tiersma of the Loyola Law School cites a response from a professor of law who had this to say about his experience of receiving instructions from a judge when he was on a jury:

> “The Judge stepped down from his tomb-like bench. Facing a huge lectern placed directly in front of the jury box, he proceeded to drone on for fifty-seven minutes giving us his ‘instructions’. Those instructions did not, in the ordinary or familiar use of that plain English word, instruct us in any way to do anything that could have been digestible to an adult without legal training. Internally contradictory in part and ponderously phrased, they were a jumble of comments, legal clichés, cautionary words, cabalistic definitions, and talmudical subtleties on the themes of reasonable doubt, diminished capacity, lesser included offense, specific intent, and other legal chestnuts.”

I like the idea of a huge lectern in the body of the court; but apart from that none of us has ever caused such a reaction in any of our juries. Or have we? In an eye-catching (at least in the title) article “Juries, Peers or Puppets – The Need to

Curtail Jury Instructions" in August 1998 the late Flatman J, when he was Director of Public Prosecutions for Victoria noted:

> "Contrary to popular belief amongst lawyers, it is not the conceptual difficulty of jury instructions which creates difficulties, but rather the language they are expressed in. Typically it incorporates legal jargon and convoluted linguistic constructions. The potential of the jury charge becoming "burdensome and irrelevant to jury deliberations" has not been missed by some members of the judiciary. While this does not decisively militate against judicial instructions – rather, it may mean that work is necessary in reformulating the style and form of such instructions – it does weigh against the provision of jury instructions in their current form."

The Australian courts have not been idle since those rather incisive comments were made. Most Australian courts have bench books; and speaking for Queensland we have endeavoured to couch the model directions in ordinary language. But have we given much thought to linguistic style, legal jargon and theories of communication?

Let's face it – we all have an individual style. Indeed it is unique. I like to think that I am very much in the vanguard of outstanding jury communicators. I received this letter recently, which with due modesty and in the words of Clancey's mate "verbatim I will quote it":

> “Dear Your Honour,
>
> I had the privilege to serve on a jury in your court-room recently. It was in the case of S. I am writing to say that all the jury thought you were really nice. We all liked your colourful gown, although some of us became confused when you kept removing and donning your wig. We couldn’t help noticing that the barristers did the same, always just after you. All of the women on the jury (and one of the men – no. 6 if you are interested) thought you were very attractive.
>
> But enough of that. The main reason for writing is to thank you for making some very difficult concepts clear. I now regularly ask my children for corroboration, and I have employed your propensity direction very effectively with my hubbie.
>
> Thank you again for the clarity of your directions. Although, as you will recall, we couldn’t agree – on anything actually – we all agreed beyond a reasonable doubt that you are a nice Judge.”

I keep a file of such letters. The unpleasant ones I either trash or send to the duty sergeant for appropriate action.

Seriously, the language we use, and the way we use it is an essential part of communication with a jury. None of you, I am sure, would use “as to” sentences in your charges to the jury. As to that I am not at all uncertain that you would not

infrequently use double or triple negatives as such use is not uncommon amongst lawyers and not infrequently employed by judges in their summing-up to juries and also by the said lawyers. None of you would commit this little linguistic howler, which comes from an actual case. Only the names have been changed to protect the innocent:

> "You might think, and as to what you think is a matter for you, that to act in the way contended for by the accused is not unreasonable or at least not unintentionally unreasonable but as I have said and I repeat it again because it is so important and fundamental that the defence don't have to prove anything, the prosecution have to negative any defence beyond a reasonable doubt, that is fundamental and it is a matter for you as the judges of the facts and as to that anything that you think I may think or indeed if you think that I have formed an opinion the said opinion is irrelevant unless you also so think … I think."

I confess I added the last "I think". I think it makes the whole magnificent statement more intelligible.

You can probably predict the response of the appeal Court. I can't give it in case I get sued, but it was similar to a famous response of one of our more acerbic Supreme Court Judges Connolly J, who was asked to consider a construction ruling made during a voir dire that occupied four weeks of court time. Connolly J observed:

> ”His Honour appears to have spent the whole of the month of June construing the meaning of two simple English words.”

Certainly, the complexity of the law is a relevant factor in problems of communication between judge and jury. It is even argued by some trial judges that the Courts of Appeal and the High Court have contributed unhelpfully to this complexity. When he was a member of the trial division of the Supreme Court of Victoria, Justice Vincent presented a paper to a Judge’s Conference in Melbourne in 1993 provocatively entitled “The High Court v. The Trial Judge”. He exposed the increasing complexity in directions required to be given at trial in relation to expanding classes of witnesses: *Bromley v. The Queen* (1996) 161 CLR 315 at 319 (“potentially” unreliable evidence), *Pollitt v. The Queen* (1992) 63 ALJR 613 at 630 (police informants), *McKinney v. R* (1990-91) 171 CLR 468 at 475(uncorroborated confession in police custody). In his paper Flatman QC was critical of the ever-expanding requirements for complex warnings, for example *Domican v. The Queen* (1992) 173 CLR 555 at 562 (identification evidence). *Longman v. The Queen* (1992) 173 CLR 555 at 562 (long delay in complaining in sexual offences). Vincent J also referred to the inherent complexity for trial judges who must tease out a direction which is legally correct, in a circumstantial evidence case from the guidance given in *Chamberlain v. The Queen (No. 2)* (1984) 153 CLR 521 and *Sheperd v. The Queen* (1990) 51 A Crim R 181. When he kindly sent me a copy of his 1993 paper, Vincent J told me that after the paper was given, Mason CJ commented to him “You passed us on theory but failed us on our prac work”. Since then there have been more judgments from the High

Court which have added to the complexity of our task; and added to the difficulties we face in directing juries in a legally correct manner. To name but a few: *Pffenig v. The Queen* (1995) 182 CLR 461 (similar fact evidence); *Gipp v. The Queen* (1998) 194 CLR 106 (propensity evidence); *Doggett v. The Queen* (2001) 119 A Crim R 416 (extending the *Longman* direction to cases where there is corroboration) – there are many more. A particular favourite of mine, in which I think the High Court did not do well in its prac work is in the area of provocation. I am sure that the average lay person does not think in terms of objective and subjective tests, but understands the concept of provocation by reference to everyday illustrations. From the various judgments of the Court in *Stingle v. The Queen* (1990) 50 A Crim R 186 at 198, benchbook committees around the country have attempted to produce comprehensible model directions which conform with the law. The following is an amalgam of extracts from the judgments in that case dealing with the objective and subjective elements of the defence of provocation. If you decide to use it in your next trial, it should be read quickly, without punctuation and in one breath (and please do not mention me as the source!):

> "The question is whether in all the circumstances of the case the wrongful act or insult with its implications and gravity identified from the viewpoint of the particular accused and in that regard none of the attributes or characteristics of the accused will be necessarily irrelevant to an assessment of the context and extent of the provocation involved in the relevant conduct was of such a nature that it could or might cause an ordinary person of the age and

> characteristics of the accused that is to say a hypothetical or imaginary person with powers of self control within the limits of what is ordinary for a person of that age to do what the accused did."

I wonder if the eminent wordsmiths and thinkers who can produce that are now gainfully employed in providing ideas and concepts for the next Matrix movie.

Our benchbook committee has done its best to convert this guidance into ordinary English:

> "Provocation consists of conduct which causes a loss of self-control on the part of the defendant and which would be capable of causing an ordinary person to lose self-control and to act in the way which the defendant did. The defendant must actually have been deprived of self-control and have killed the other person whilst so deprived.
>
> You have to weigh up a number of factors, including the gravity of the provocation to the particular defendant. In considering the level of seriousness of the provocation to the defendant, you take him as he is. His race, his colour, his habits, his relationship with the deceased and his age are all part of this assessment. The acts relied on by the defendant as relevant in affecting his mind and causing him to lose self-control include … So form your own view on the gravity of the provocation to this particular man. Do you think it of a high or low order?

> Then we come to the final and critical question whether an ordinary person reacting to that level of provocation would suffer a similar loss of control [that is to say stab the other man etc]. The ordinary person is not assumed to be a saint. He is expected to have the ordinary human weaknesses and emotions common to all members of the community and to have self-control at the same level as ordinary citizens of his age. In this area of the law we recognise that there does occur a snapping point where an ordinary person may do something that he would not dream of doing under normal circumstances."

Whether we are wrong or right or partially so or either or both remains to be seen. I hope we have done better than some of our American colleagues whose benchbook model directions are described by Professor Tiersma in this way:[3]

> "Like priests debating fine points of a Latin mass to be delivered to French-speaking peasants, lawyers devote tremendous energy to refining arcane statements of law that mean little to the jury. Justice Frankfurter noted that all too often instructions to juries are "abracadabra". And as Judge Jerome Frank put it: Time and money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a

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> foreign language – that, indeed, for all the jury's understanding of them, they are spoken in a foreign language. Yet, every day, cases which have taken weeks to try are revised by upper Courts because a phrase or a sentence, meaningless to the jury, has been included in or omitted from the judge's charge."

Although it is tempting to suggest that the problem is confined to America, the paucity of focussed research in this country is probably a factor. The Americans have attempted to modify standard jury directions to make them more comprehensible to juries. In an article published in 1984, a number of lawyers and a professor of psychology undertook research into the effect on jury comprehension of a large number of simplified standard directions.[4] By way of demonstration, I will focus on the standard of proof direction. In Queensland, the benchbook suggests the following direction which draws on *Krasniqi* (1993) 6 SASR 366 and *Chatzidimitiou* [2000] 1 VR 493:

> "A reasonable doubt is such a doubt as you, the jury, consider to be reasonable on a consideration of the evidence. It is therefore for you, and each of you, to say whether you have a doubt you consider reasonable. If at the end of your deliberations, you, as reasonable persons, are in doubt about the guilt of the defendant, the charge has not been proved beyond reasonable doubt."

[4] "Towards Criminal Jury Instructions The Juries Can Understand", The Journal of Criminal Law and Criminology – Vol 75, No.1 1984.

The pattern instruction used in some American States is:

> “A reasonable doubt is one for which a reason exists. A reasonable doubt is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.”

The researchers firstly revised that instruction to eliminate potentially confusing language:

> “A reasonable doubt about guilt is not a vague or speculative doubt but is a doubt for which reason exists. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after that person has fully, fairly and carefully considered all of the evidence or lack of evidence. If, after such thorough consideration, you believe in the truth of the charge, you are satisfied beyond a reasonable doubt.”

The direction was then simplified further, described in the article as “super simplified” – only an American could use such a word:

> "A reasonable doubt about guilt is not a vague feeling or suspicion. It is a doubt that a reasonable person has after carefully considering all of the evidence."

I do not have time to discuss the methodology used by the researchers; indeed, I found it complicated and confusing, but they conclude that at every stage of simplification, jury understanding of the concept increased.

In the United Kingdom and New Zealand a different formula again is used. The model direction from the Crown Court Criminal Bench Book is:

> "How does the prosecution succeed in proving the defendant's guilt? The answer is – by making you sure of it. Nothing less than that will do. If, after considering all the evidence you are sure that the defendant is guilty, you must return a verdict of "Guilty". If you are not sure, your verdict must be "Not guilty".

One of my colleagues resorted to this direction in a trial recently and the conviction was overturned as a result.[5]

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[5] *R v. Punj* [2002] QCA 333: The "gloss" there was in these terms:

"Now, I am not going to use other words to explain the expression 'beyond reasonable doubt', but I can *illustrate* it perhaps this way. We often use expressions in our everyday lives whereby we think something has happened but we are *not really sure* about it, don't we? We are *very suspicious* about something, we think it is very likely that so and so committed an offence, it is on the cards, expressions like that, or probably someone committed an offence. All those ideas have with them, don't they, the idea that we are not *really sure*, we just think probably or likely or something of that sort, so in all of those cases, what someone is saying is well, I've got a reasonable doubt about it, even though I have got suspicions or whatever. Do you see?

What it *really means* is this? At the end of your deliberations, if you are to convict, you must *feel sure* that Mr Punj committed these two offences, and you will not *feel sure* if you have got a reasonable doubt in your minds about the proof of the cases. Do you understand what I am

In “Lawyers’ Language – How and why legal language is different”, Alfred Phillips refers to a journalist’s account of his jury service, particularly in relation to the direction or standard of proof:

> “In instructing the jury in those terms, the judge was recycling the Lord Chancellor’s department’s guidance to judges. Evidently, the voice of the Plain English Campaign is still plainly to be heard in the corridors of power, still prey to the inbuilt fallacy that more demotic (he means ‘common’) language means more democracy. But the jury … had difficulty with the instruction. After deliberating for almost a day, they came back with a question they were having trouble with the word ‘sure’. Could the judge help them: for example, would ‘reasonable doubt’ suffice instead of ‘sure’.”

The journalist makes the point:

> “… whereas the concept of “reasonable doubt” provides a pole around which juries can argue, the concept of “sure” is highly problematic.”[6]

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saying? To take a very concrete example arising out of this very case, if at the end of all your deliberations you think that there is a *reasonable chance* that Cathy Slack did this, well, then you could not possibly say you are persuaded beyond reasonable doubt that Mr Punj did it, could you? Because of the two things. Do you see what I mean? So, the doubt has got to be a reasonable one, but once there is a reasonable doubt, an accused person is entitled to be acquitted.” (my emphasis)

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The problem for us as trial judges is that juries do ask questions such as “what is reasonable doubt”. Given the clear guidance from above, we are discouraged from any explanatory gloss on the classical formula: *Green v. R* (1971) 126 CLR 28; *Reeves* (1992) 29 NSWLR 109, 117; *Holman v. R* [1997] 1 Qd R 373,380. But we have a responsibility to assist the jury because “failure to clear up a problem which is or may be legal will usually be fatal (to any conviction…)”: *Berry* [1992] 2 AC 364 at 383. So how do we respond if the jury asks this question? It is hardly going to help to say “I’m sorry I can’t help”. The Queensland benchbook suggests a response in terms of the model direction. In *R v. Irlam; Ex parte Attorney-General* [2002] QCA 235, the trial judge was criticised by the Court of Appeal for this direction:

> “Before you can convict the defendant on the count you consider for the moment you must be satisfied that the prosecution has proved every element of that particular offence beyond reasonable doubt.
>
> As you have heard from counsel, legal people are not able to help jurors with explanations of what is a reasonable doubt although sometimes juries ask for assistance. Reasonable doubt is an ordinary English expression. The words mean what they say. They refer to a doubt that is based on reason and commonsense. They do not extend to something fanciful or imaginary that I suppose could always be thought up for the purpose of doing the unpleasant duty of pronouncing a fellow citizen guilty of a criminal offence.

A doubt is reasonable and an insuperable barrier in the way of a conviction on the count you are looking at for the moment if you think it is reasonable. There may be doubts that are suggested to you by counsel for your consideration or that you think of in the jury room to be considered which, in the end, you reject as something less than reasonable and not standing in the way of a conviction.

If the stage is reached on a particular count where you are satisfied beyond reasonable doubt that the prosecution has proved the existence of every element of the offence in question your oath requires you to acknowledge that by returning a guilty verdict.

On the other hand, if there is, in your mind, a doubt which you think is reasonable about the proof by the prosecution of just one of the various things that it has to prove to establish a particular count then the defendant's right is to be pronounced not guilty in relation to that one. There is no legal test of what is a reasonable doubt. You do not have to imagine that you are lawyers or professors of logic or philosophers; it is community standards represented by the juror standards which are applied in determining what is a reasonable doubt. And remember, you cannot convict on a particular account unless you are so sure of the defendant's guilt that you can say, "There's no reasonable doubt about it." "

Perhaps the answer lies in the approach of one of our very senior judges who is alleged to have responded to such a question by the jury, after a trial of less than a day involving word against word and only two witnesses and a retirement of 12 hours without a word:

> “It’s what you have got now.”

I was intrigued by the concept of a summing-up to a jury so incomprehensible that it might as well have been in a foreign language. Being a curious person, I experimented. I know it is difficult for you to imagine yourself as a juror but I ask you to try for a moment. Here is the start of the Queensland direction on attempts written firstly in “abracadabra”:

> “When a person, intending to commit an offence, begins to put his or her intention into execution by means adapted to its fulfilment, and manifests his or her intention by some overt act but does not fulfil his or her intention to such an extent as to commit the offence, he or she is said to attempt to commit the offence.”

Now here is the same direction in French:

> "Lorsqu'une personne destinée à commettre une offense, ommence à executer son intention par des moyens adaptés à son accomplissement et manifeste cette intention ouvertement mais ne la réalise pas jusqu'au point à commettre l'offense, on dit qu'il ou elle tente de commettre l'offense".
> (**Spoken from the audience by Judge Skoien**)

I’ll let you be the Judge!

The linguistic studies in the United States certainly conclude that complexity of the law is a very relevant factor, however "a more fundamental reason for the difficulty that juries have in comprehending jury instructions is the linguistic nature of the instructions themselves".[7]

Professor Tiersma in his paper uses a telling analogy. You have all had the experience of purchasing an unassembled something, for example a child's swing. If the instructions are not in Japanese, they are probably not written for dummies. If you are fundamentally incompetent in such tasks, as I am, you have no doubt felt the same frustration as I have as the damned thing won't fit together, and, to add to the stress, a small whining child hovers urging you to finish. Professor Tiersma says that in the same way, the effect on a jury of poorly written directions that use a large number of undefined technical terms with no illustrations, is that they are impossible to follow. On the other hand, if the instructions are more "user friendly", perhaps including illustrations and laying out the logical steps the jury must follow, then the jury is much more likely to properly apply the law to the facts. Again, the U.S. research suggests that juries are assisted by written directions provided that these are framed in ordinary language. They are assisted by other aids to understanding, such as flow charts, pictures and even computer generated images. I can hear some of you wince – the South Australian study to which I referred earlier even suggests that research into how people take in new information may even lead to audio animations (defined in ordinary English as "cartoons") being used by judges in

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communicating with juries. I don't know if this will help. It occurred to me, that the use of cartoons or pictures could open up another rich lode of opportunities whereby the sighing, gesticulating judge of yesteryear, could re-emerge in the digital age. For example:

> "Members of the Jury, the defendant [**gorilla**] does not have to prove anything. It is only if you believe the complainant [**child**] beyond a reasonable doubt that you can convict the defendant [**gorilla**]. It is not a matter of weighing up her evidence against the defendant [**gorilla and child together**]. Even if you reject the evidence of the defendant [**gorilla**] it does not mean necessarily that he is guilty. To find the gorilla guilty you have to be satisfied beyond a reasonable doubt that the little angel child is truthful and reliable [**gorilla and child together**]. It is a matter for you."

I guarantee that there are some of you who are already mentally booking into a PowerPoint course. I think the jury would get the message, but it would be a matter for them, wouldn't it?

Many judges already use flow charts, PowerPoint, and written directions in instructing a jury. Judge Mary Ann Yates in Western Australia is somewhat of a pioneer in the area, and has given a number of papers on the topic.

I am grateful to Judge Brabazon of the Queensland District Court and Justice Fryberg of the Supreme Court of Queensland for some examples of written directions and flow charts used by each of them in trials. Essentially, I am a lazy person, and I have only used written directions in relation to alternative verdicts. Justice Fryberg is one of those judges who Sir Humphrey Appleby would describe as “courageous”. Those of you from interstate may be surprised to hear that in Queensland, because of s.619 of the *Criminal Code*, the practice is that defence counsel is not permitted to address the jury until the defence case opens. In *R v. Nona* [1997] 2 QdR 436, Fryberg J broke with this tradition, ruling that s.619 is not a comprehensive statement of the law in relation to addresses of counsel, and the Court has an unfettered discretion to permit defence counsel to make an opening statement to the jury of the matters in issue immediately after the Crown opening. Such a process will certainly assist the jury to concentrate on the real issues in the trial.

The failure of the jury to be properly informed of the real issues of fact and law until the end of the trial was the subject of much adverse comment in the jury survey conducted in New Zealand in 1998. In that study 312 jurors from 48 trials were interviewed over a nine month period in 1998. The judge from each case was also interviewed. There was significant complaint about the failure of the trial process to inform the jury of the real issues until the end of the trial, after the evidence was concluded. In one case the jurors said that throughout the three week trial they all believed that the real issue was the accused’s sanity, when it was intention.

Armed with this research and emboldened by the courageous Fryberg J (the Crown had objected but had not appealed). I enthusiastically offered the right to counsel at my next trial. My enthusiasm has waned somewhat since then. Most defence counsel look at me as if I had chronic halitosis. Some have taken it up and I am certain it greatly assisted the jury and the interests of justice. In many cases, I doubt if defence counsel actually knew what the real issues were, but he or she were hoping something might come up!

The use of charts, chronologies and schedules of evidence by judges is not new. The trial judge has to be careful to ensure that these aids are firstly accurate and are not used by the jury in substitution for the evidence.[8] Written directions are not as common in practice and as the learned authors of "Australian Criminal Trial Directions" observe:

> "An examination of the cases reveals no settled principle or consistency of practice and procedure."

By reference to some of the materials used by Judge Brabazon and Justice Fryberg, I can demonstrate the process through the use of computer generated images.

This is a written direction given by Judge Brabazon in a case of *R v. Chi Kin Li*:

> [**Judge Brabazon's chart – 3 pages**]

[8] For a useful discussion of the relevant cases, see Tilmouth "Australian Criminal Trial Directions" at 7-900.

This is an example of one of Justice Fryberg's flow charts:

[**Justice Fryberg's chart – 3 pages**]

The industry and effort demonstrated by this rather remarkable document is obvious.[9] He also uses the computer in the course of the summing up. Important concepts will be displayed on a large screen (operated by the Associate from his laptop) as the Judge deals with these concepts in his oral presentation.

There is a danger that such aids might in fact add to the jury's confusion; and great care has to be taken to ensure that the charts etc. are an accurate depiction of the evidence.

[**Knowledge Nation Flow Chart**]

The dangers are demonstrated in cases such as *Phillips v. The Queen* (1971) 45 ALJR 467 at 470 per Barwick CJ. Perhaps the most succinct statement, which, in the great tradition of appeal courts throughout time, leaves all sorts of traps and tribulations open, but firmly places the responsibility on the shoulders of the trial judge is that of Young CJ in *R v. Wilson* (1985) 17 A Crim R 359 at 362:

[9] This flowchart was unanimously approved by the Court of Appeal in *R v. Gwilliams* [1997] QCA 389. The Court said: "A number of specific grounds of appeal appear in the notice of appeal. The trial judge provided the jury with a flow chart to illustrate the various verdicts that were available in respect of the three accused, who included Munro. The use of charts in complex trials has been encouraged by the court and has been described as "a desirable procedure". See Smith v. The Queen (1970) 121 C.L.R. 572, 577. The chart itself is not criticised as being inaccurate and, if it has an appearance of complexity, that is a consequence of the relevant provisions of the Code rather than of the chart itself."

> "The question whether a trial judge should provide any instructions to a jury in written form is a question which must be, in my opinion, a matter for the discretion of the trial judge. It is plainly not a step which is taken lightly. It must be in every case a question whether the trial judge thinks that it will assist the jury in their task if some part of the instructions which they require is committed to writing."

The Queensland Court of appeal in a recent decision appears to have adopted quite old authority to the effect that written instructions can only be used by the jury in order to understand the oral directions: *R v. Bourke* [2003] QCA 113 following the Court of Criminal Appeal in New South Wales in *R v. Petroff* (1980) 2 A Crim R 101. In *Bourke* the judge had made an error in the written direction but not in the oral direction given in the course of the summing up; so this ground of appeal was not upheld.

It follows that despite the overwhelming approval of written directions from juries, it is still a fraught practice which should only be undertaken with great care.

Conclusions

I have probably left you with more questions than answers. It is true, to use the words of the Chief Justice of the High Court, conducting a criminal trial "can be like walking on egg shells"[10].

[10] *Judicial Selection and Training: Two sides of the One Coin*. Murray Gleeson: Judicial Conference of Australia Colloquium – Darwin, 31 May 2003

From now on, I hope you will eschew the use of “as to”, as in as to the use of double or triple negatives you will not infrequently fail to use the same in said communication with said juries. Use short sentences if you can. Long complex sentences are apt to confuse not only the listener but also the speaker. Keep in mind, to use the words of the world’s most famous mediator in his lesser known role as Chief Justice of New South Wales, Street CJ in *Flesch* (1987) 7 NSWLR 554 at 558 “a summing up should be as succinct as possible in order not to confuse the jury”. Singing is not on, especially if you can’t sing. Verse is risky. Even the famous poet judges in the United States are feeling the hot breath of high appellate disapproval. In a concurring opinion in *Porreco v. Porreco*, Chief Justice Stephen A. Zappalla expressed his “grave concern that the filing of an opinion that expresses itself in rhyme reflects poorly on the Supreme Court of Pennsylvania”. His remarks prompted one Tracey Blitz Newman to write an article in “The Legal Intellingencer” on the 12th April 2002 entitled “Adverse to Verse”!

Notwithstanding my own caveat, and as a tribute to the principal organiser of this conference Judge Alan Wilson, and for his benefit and hopefully use, I have converted the standard standard of proof direction (that might be better expressed as the accepted standard of proof direction) into a limerick:

Beyond a reasonable doubt
A phrase with plenty of clout
It means what it says
We say it in prayers
To explain what it’s really about.

My hope is that McPherson JA is the presiding member of the Court of Appeal the first time I try this, and that Callinan J is on the High Court Bench. At least they will appreciate the effort. Justice McPherson is one of those rarely gifted appellate Judges who has the ability to make one feel good about being wrong.

Some of you, like me, will not regret the gradual passing of the so-called "*Weissensteiner* Direction" into history as a result of cases such as *Azzopardi* (2001) 75 ALJR 931. As a tribute to our appellate Masters, and to conclude, I will ask Judge Michael Strong to give this dying direction to the strains of Sir Edward Elgar's Nimrod (Enigma Variations).

> "A defendant admits nothing by choosing not to testify, and his silence cannot displace the burden which the prosecution bears to prove his guilt beyond reasonable doubt. But if there is other evidence sufficient to sustain a verdict of guilty. His omission to explain the pertinent fact may make the prosecution evidence more convincing. In general, a jury may draw inferences adverse to a defendant more readily by considering that a defendant who, because of facts which must be within his knowledge, can deny, explain or answer the case against him has not done so. In particular, possibilities consistent with innocence may cease to be reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the defendant. However, if the evidence is insufficient in quality or extent to warrant conviction, the defendant's silence cannot supply its deficiencies. Moreover, a defendant may have reasons not to give evidence other than that his evidence would not assist his case: for example, timidity, a concern that cross-examination might confuse him, (that he gave an explanation to the police), a (memory loss) or a perception that deficiencies in the prosecution case would lead you to entertain a reasonable doubt as to his guilt. You must bear that in mind in considering whether the prosecution case is strengthened here by the defendant's decision not to testify."