

**CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN
TERRITORY
2017 CONFERENCE**

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***REFLECTIONS ON THE UNSW JURY STUDY ON JURORS'
NOTIONS OF JUSTICE AND THE ROLE OF NARRATIVE IN THE
CRIMINAL TRIAL***

Key Findings

- 30% of the jurors considered their role to be the pursuit and determination of the objective truth
- 20% of the jurors considered that the prosecution and defence were 'equal adversaries' with equal rights and obligations (including attitudes that defence rights were 'not justified')
- 15% of the jurors believed that it was justifiable in certain circumstances to ignore the judicial direction not to engage in private juror inquiry

Recommendations

- Review the role of s. 68C of the *July Act 1977* (NSW) – in terms of prosecutions of jurors and explanations to juries of the criminal consequences of judicial inquiry
- Review of guideline directions on the explicit recognition of the accusatorial framework of the criminal justice system

Recommendations

- Review of directions on the role of the rules of evidence in a trial and an explanation of how inadmissible evidence has the potential to mislead and confuse a jury
- More specific guidance for juries in the linking between charged offences and evidence in the trial (such as use of 'decision trees')
- Jury support beyond instruction from the bench

The Jurors' comments

- Juror 241
- “...wished on a number of occasions the Crown would supply us with more details and the defence would go down another path, it felt like we as the jurors were being deliberately confused.”
- Many jurors wanted more evidence to “make a more accurate verdict” and “make the situation clearer” or make deliberations “more productive and focused” and “to process information differently and reach different conclusions”, to “make an informed decision” and to “fill the gaps.”

- Juror 23D - wrote a note to the judge asking why a witness was missing.
- Commented that it was not acceptable to make private inquiry as a juror, but stated “BUT having been TOTALLY FRUSTRATED with inadequate evidence in our case I could understand why a juror may do THIS.”

- Regarding the missing witness: “we, as a jury, felt absolutely in the dark! We had no solid factual evidence supported by any witnesses or police statements. We were aware that the victim had made statements to the police, but when we requested them we were told that we were not able to have them...”
- “The ‘evidence’ was the two conflicting statements of the victim and the accused. No witnesses, no police records – even though we asked for them. I must say that as a group, the jury spent the first couple of hours being ‘angry’ and feeling let down by the crown’s lack of supporting evidence. All we could say was doubt, doubt, doubt!”

- Juror 28K
- “Some people mentioned in evidence were not called as witnesses and as a jury we believed that had this occurred we would have reached our decision far more easily, and perhaps it may have been different.”

- Juror 11F
- “Only about 20% of the story gets told in court. Alleged crimes occurred between people who knew each other very well. It was one person’s word against another’s. We could have understood the people, their relationship and their situations better. We would have liked to hear more in court...”

- Juror 29H - annoyed at the unprepared prosecutor who would 'read statements to himself' before asking questions of witnesses
- "...[i]t may have been useful to allow jurors to ask the judge questions and have feedback as to why it may not be relevant or is unknown."

- Juror 25D
- “If we had more information allowed and not put as ‘MFI’ then we might have been able to process information differently and help us reach different conclusions.”

- Juror 22C
- “The decision making process is not easy based upon one barrister’s perspective and facts put forward. My experience was that 12 people (jury) were able to uncover many key points missed by both Crown and defence. If this info was at times available it may assist with some undecided jurors.”

- Juror 12H
- “We would be better served if the process was not only adversarial but sought information and truth.”

The criminal trial

- Accusatorial
- Adversarial
- See, for recent discussion, *R v Baden-Clay (2016) 258 CLR 308*
- See, for example, NSW Benchbook on directions for judges
- Distinction between objective and legal (or 'procedural') truth

Implications for advocates

The value of an opening address

- Note the limitations
- Section 159 *Criminal Procedure Act 1986 (NSW)*
- *R v MM [2004] NSWCCA 81*
- *R v Xie (No 14) [2014] NSWSC 1979*
- *R v Brooks (No 2) [2017] NSWSC 260*

Implications for advocates

The creation of a positive defence case (where possible)

- The use of directions to explain gaps in the evidence (where possible)
- More considered use of documents and MFIs
- More considered attempts to lead evidence as a narrative
- More considered use of objections

Implications for advocates

The effective use of chronologies, summaries and transcripts

- Section 50 *Evidence Act 1995 (NSW)*
- Section 55C *Jury Act 1977 (NSW)*
- *R v Bartle and others [2003] NSWCCA 329*
- *R v Qaumi & Ors (No 66) [2016] NSWSC 1403*

Implications for advocates

Responding to jury questions

- *Tootle v R [2017] NSWCCA 103*
- *Lo Presti (1991) 58 A Crim R*