

ASPECTS OF THE LAW RELATING TO JURY TRIALS

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The law relating to jury trials is diverse in its sources and by no means consistent in its content. This article examines aspects of the law relating to jury trials and the extent to which the verdict of a jury in a criminal trial may be challenged on appeal because of defects in the way the trial was conducted or the manner of taking its verdict. The relevant law may conveniently be examined in a sequence corresponding to the course of the trial: the selection of the jury; the hearing of the case; the jury's consideration of the issue of guilt or innocence, and the rendering of its verdict.

I THE SELECTION OF THE JURY

The law in relation to the composition of the jury is now found in two recent statutes: the Juries Act 1981 and the Crimes Act 1961, as amended by the Crimes Amendment Act (No. 2) 1980. In addition to these statutes there is an apparent, though ill-defined, inherent power in the courts to regulate matters not clearly laid out in the statutes.

The Juries Act 1981 considerably simplified the law relating to jury trials. In essence it provides that all registered electors between the ages of 20 and 65 are qualified to, and may be called upon to, serve on a jury.¹ Individuals may be disqualified by reason of a prior criminal record in some cases² and certain classes of people may not sit on a jury at all.³ These forbidden classes are principally those connected with the administration or operation of the justice system, but includes also persons incapacitated by physical infirmities, such as deafness or blindness, or suffering from mental disorders.⁴ Jurors can be challenged for lack of the basic qualifications under s.6 or for disqualification under s.7 or being barred by s.8 or they may be challenged as not being impartial as between the defence and the prosecution.⁵ It is provided by s.25(2) of the Act that these are to be the *sole* grounds of challenge for cause of any juror. Any challenge for cause is to be determined by the judge in chambers "in such manner and on such evidence as he thinks fit".⁶

These provisions leave unanswered two potentially important questions. The first is whether there are any procedural requirements as to the way in which the trial judge decides any challenge for cause. Discussion of this can conveniently be postponed to consideration of the ambit of s.376 of the Crimes Act 1961.

The second question is the degree to which the provisions of s.25(3) distort the recognised law relating to the selection of the jury. It is clear that the classes of persons excluded by the Act do not cover all the disabilities

¹ Juries Act 1981, s.6.

² Juries Act 1981, s.7.

³ Juries Act 1981, s.8.

⁴ Juries Act 1981, s.8(i) and (j).

⁵ Juries Act, s.23 and s.25.

⁶ Juries Act, s.25(3).

which the common law recognised as rendering a juror unsatisfactory. Intoxication of a juror at the time of empanelling would appear to have been a ground of incapacity which should have disentitled the juror to sit.⁷ More importantly, inability to understand the language in which the trial was conducted has been held to render the juror disqualified from serving.⁸ Although such grounds for objection might be held at common law to have been waived if counsel knew of them at the time of the empanelling of the jury and failed to object,⁹ it appears that under the New Zealand Act counsel could not challenge the juror for cause.

At common law simple misnomer of a juror would not prevent the juror from sitting, but the deliberate impersonation of a juror by another person not qualified to sit rendered the trial a nullity.¹⁰ If a person qualified to sit on a jury but not summoned for this sitting of the court appears and impersonates a person duly summoned, it appears he also cannot be challenged for cause.

It is also important to note that s.33 of the Juries Act 1981 provides that the verdict of a jury is not to be "in any way affected merely because" of the presence on the jury of a person not qualified to sit or disqualified from sitting by s.7 or s.8. The logical implication of this is that the presence of a juror who ought not to have sat alone is no ground for challenge to the verdict; but if there is an added element (e.g. incomprehension of the language) which renders the verdict unsafe or unsatisfactory, the verdict is challengeable. The essence of the challenge is therefore not the lack of formal qualification by the juror but the risk of an unsafe verdict. It is perhaps not surprising to the student of New Zealand legislation that s.33 thus appears to contemplate the validity of a challenge to a verdict because a juror was incapable of performing his function properly but does not allow that juror to be challenged for cause on the same grounds. It is, however, a result which might strike the logician as unusual.

These lacunae in the Juries Act are the more surprising since in the 1980 amendment to the Crimes Act certain other grounds for challenge recognised in the cases, notably the illness or impending death of a relative of the juror, became a ground for the discharge of the juror.¹¹ It would appear that counsel who is aware at the time of empanelling a juror of disabling characteristics such as impersonation, intoxication or incomprehension cannot rely on a challenge for cause but must rely either on a peremptory challenge or seek the assistance of the trial judge. The power of the judge to assist must derive either from s.374 of the Crimes Act or from an inherent power in the court. The statutory provision gives the judge the power to discharge the jury without giving a verdict if it has deliberated for four hours without giving a verdict¹² or, more generally, if 'in any emergency or casualty' it is 'highly expedient' to do so.¹³ Individual

⁷ *Ex parte Morris* (1907) 72 JP 5.

⁸ *Ras Behari Lal v King Emperor* [1933] All ER Rep. 723.

⁹ See *Ras Behari Lal v King Emperor* [1933] All ER Rep. 723 at 726.

¹⁰ *R v Wakefield* [1918] 1 KB 216.

¹¹ Crimes Act 1961, s.374(3) as substituted by Crimes Amendment Act No. 2, 1980, s.13 — cp. *Mansell v Reginam* (1857) 8 E & B 54.

¹² Crimes Act 1961, s.374(2).

¹³ Crimes Act 1961, s.374(1).

jurors can be discharged 'at any time before the verdict of the jury is taken' on the compassionate grounds noted above or if the Court becomes aware that a juror is disqualified or the juror 'becomes incapable of continuing to perform his or her duty'.¹⁴ The exercise of the judge's discretion to discharge is stated to be not reviewable in any court.¹⁵

It may be noted that this last provision appears to have been based on the common law rules, but it is to be doubted if it can be read without qualification. If there were a refusal to discharge the jury which resulted in a clear miscarriage of justice it is hard to believe that the Court of Appeal would not allow an appeal against conviction. It seems that the cases of impersonation of a juror or incomprehension by a juror of the language used at the trial render the trial a nullity within the meaning of s.385(1)(d) of the Crimes Act, since this would have given grounds for a *venire de novo* at common law.¹⁶ However if the discretion to discharge is exercised it is unreviewable.^{16a}

The section does not seem apt to cover cases of original incapacity such as ignorance of English — a juror incapable of performing his duty at the outset does not 'become' incapable — but on a broad approach to statutory interpretation such cases could be covered by that provision. It is submitted however, that the word 'disqualified' in s.374(3) ought not to be restricted to the meaning given by s.7 of the Juries Act 1981, and that all cases of disqualification at common law are to be comprehended by the current provision.¹⁷ It is suggested that such an interpretation would give the trial judge a similar power in regard to a juror as that contained in regard to the whole jury by s.374(1). It has long been recognised that that power should be used only where there is a substantial risk of prejudice to a fair trial between the parties.¹⁸ Those grounds of disqualification not included in the Juries Act are all predicated on the risk of the trial being unfair. It would be desirable to have a high degree of compatibility between the applications of the two provisions.

The inherent jurisdiction of the court in controlling the composition of the jury is of uncertain scope. It is clear from the case law that it exists¹⁹, but the cases have not clearly laid down its limits. In *Greening* the Court of Appeal considered that, at the least, the judge has a power to exclude from the panel from which the jury is drawn any person who may not be indifferent as between the parties and it was of the opinion that the power was sufficient to exclude a juror who had been ballotted and whose presence on the jury was not challenged by counsel. The existence of the inherent power to intervene in the interests of a fair trial is not doubted in *Bell* and *Re Kestle No. 2*, but both cases are concerned with instances

¹⁴ Crimes Act 1961, s.374(3).

¹⁵ Crimes Act 1961, s.374(8).

¹⁶ See the discussion of s.385(1)(d) in *Re Kestle* [1980] 2 NZLR 337, at 348 and *Re Kestle (No.2)* [1980] 2 NZLR 353, 358.

^{16a} *Felise* (unreported C.A. 268/83, decn 5.10.84).

¹⁷ This 'disqualification' may also cover possible lack of impartiality thus covering the point raised by the Court of Appeal in *Re Kestle (No.2)* *loc.cit.* at 357.

¹⁸ See *Binley & Walsh* (1912) 31 NZLR 949, 15 GLR 42 and cf. *Adriaanse* [1977] 2 NZLR 337.

¹⁹ See *Re Kestle (No.2)* [1980] 2 NZLR 353, *Bell* [1958] NZLR 449 and *Greening* [1957] NZLR 906.

where the inherent jurisdiction was excluded by the statute because the jury had actually been empanelled before jurors were excluded. It seems that in both the latter cases the court was of the opinion that once the jury had been empanelled, the only recourse of the judge is to his statutory powers and the inherent power is no longer operative. While this is probably the correct approach, it is clear that the limits of judicial control over jury selection are not yet clearly defined. It is suggested that the power to exclude jurors is not limited to partiality, or the possibility of it, but extends to other forms of incapacity or disqualification (as would appear to be the view of the Court in *Greening* from their reliance on *Mansell v The Queen*²⁰). However, it must be doubted whether in practice the power will be of use except where the defect is readily apparent. It seems accepted that a judge can invite jurors to disqualify themselves for possible bias, either because of knowledge of the circumstances or persons involved in the trial or possibly on wider grounds²¹, but it is to be doubted whether he would be entitled to raise any other grounds of incapacity to serve. It is also difficult to determine whether counsel can seek to have the judge intervene and use his inherent powers without contravening s.25 of the Juries Act 1981 — insofar as, in effect, they would be challenging for cause on grounds not given in the Act. A breach of s.25 in these circumstances might, however, be regarded by the Court of Appeal as being an irregularity which can be dismissed as not causing any miscarriage of justice. Certainly the approach taken in *Re Kestle (No.2)*²² would appear to excuse an intervention by the judge to provide a fair trial even if it is technically outside his powers.

The above discussion has omitted reference to the judge's power to stand aside jurors. The relevant provision, s.27 of the Juries Act 1981, allows the judge to stand aside any juror either on his own motion "in the interests of justice" or on application by either party consented to by the other party, or one of the other parties. This provision would deal with such difficulties as the juror who is intoxicated at the time of the empanelling of the jury, and would logically exclude a person who appears to the judge not to have sufficient command of English to comprehend the proceedings. However, it is not always a sufficient safeguard in that a juror who has been stood aside may nevertheless be required to serve if otherwise a full jury cannot be empanelled. If that should be the case eligibility to serve will become a live issue.

The foregoing has largely related to grounds for challenge which are not, or may not be, covered by the existing law. Before departing from this area, it is desirable to consider a special case of the ground for challenging for cause — that of knowledge of any prior criminal record of the accused.

It appears clear that if the jury as a whole is made aware of prior convictions of the accused by the admission of inadmissible evidence of it, the verdict may be challenged.²³ Further, if the jury is made aware of contemporaneous proceedings against the accused which have resulted in

²⁰ (1857) 8 E & B 54, 120 ER 20.

²¹ E.g. the request by the trial judge in Dr. Arthur's case that no-one connected with handicapped children should serve — see the reference in *A-G v English* [1982] 2 All ER 903, 906.

²² *loc.cit.*

²³ See the cases cited in Adams, *Criminal Law and Practice in New Zealand*, 2nd ed., p. 973ff.

conviction, or even in disagreement with a majority in favour of conviction the verdict should be quashed.²⁴ This is predicated on the risk of prejudice to the accused — the same ground as was relied on to exclude jurors who have sat in related trials in *Greening*.

Yet, it appears that where a single juror is made aware of, or has prior knowledge of, prior criminal behaviour by the accused, there is not necessarily a fatal flaw in the proceedings.

There appears to be no authority on this point in New Zealand, and the English and Australian cases are not entirely consistent. In England, it appears that a juror with prior knowledge of convictions ought not to serve on the jury²⁵; and if such a person does sit and the fact becomes known the usual and proper course is to discharge the jury as a whole.²⁶ The presence of a juror with such knowledge does not, however, make the trial invalid and it is possible in proper cases to affirm the conviction if no serious miscarriage of justice has occurred.²⁷

The Australian approach, as shown in the recent decision of *Booth*²⁸ is less stringent. The Victorian Court of Criminal Appeal held that the key question was whether the juror had predetermined the issue, and the juror's knowledge of the accused's prior criminal history did not indicate such predetermination. On that basis a juror with such knowledge may, it seems, sit provided the knowledge does not make him refuse to consider the evidence led at the trial.

The New Zealand courts are free to choose between these approaches. It is suggested that, insofar as jurors may now serve despite prior criminal records of their own, the risk of a juror with knowledge of the accused's antecedents is increased and, it would thus be inconvenient to adopt the English view. If the juror prefers not to serve, there is no doubt that he could be discharged under the inherent power, but his continuance on the jury would not, of itself, vitiate the verdict.

There is connected with this issue a problem of resolving the procedure for determining whether the presence of a juror may have vitiated the trial. In *Hood* the Court of Appeal received evidence by affidavit from the juror as to his knowledge and whether he had communicated it to any other juror. This was seen as not infringing the rule against receiving evidence as to what took place between the jurors in their consideration of the issues during the trial. In *Box* the Court of Appeal even went so far as to call the juror before them and examine him as to his conduct. This latter cause of conduct was strongly attacked by Lush J. in *Booth*. In that case the court received an affidavit from the person who was the source of the juror's information about the accused, but not one from the juror herself. Lush J. took the view that to receive affidavits from the juror might be permissible but to examine a juror could only be justifiable in extreme cases.

Before further considering this procedural problem, regard should also

²⁴ See *R v Parry* [1948] NZLR 191. Quare whether such a defect is now absolutely fatal — in the light of *Re Kestle (No.2)*.

²⁵ *Box* [1964] 1 QB 430; [1963] 3 All ER 240.

²⁶ *Hood* [1968] 2 All ER 56.

²⁷ As was in fact done in both *Hood* and *Box*.

²⁸ [1982] 8 A.Crim R. 4, Victorian C.C.A.

be had to two other possible challenges to the continuance of the jury which present similar procedural issues. These are contacts between jurors and the public or persons connected with the trial and cases where attempts are made to influence or affect the verdict of the jury or members of it.

Contact between the jurors and persons connected with the trial is seen clearly as an irregularity but not one which necessarily vitiates the trial. The English courts in a series of cases have shown that provided nothing of substance concerning the trial passed between the jurors and others in some way connected with the trial the verdict is unaffected. It appears that the jurors may be examined by the trial judge to determine whether any matter of substance did pass between the parties.²⁹ The New Zealand Court of Appeal has taken a similar approach to the problem of contact with a juror in *Riley*³⁰ although in that case no evidence from the juror was offered or sought as the Court was satisfied from the affidavits of the witnesses who had discussed the case briefly with a juror that nothing of significance had been shown to have passed between them.

Different considerations obviously apply where the juror goes out of his way to make contact with the accused³¹ or the jury has been sequestered³² or have retired to consider their verdict. In such cases it appears that contact with members of the public or particularly with persons connected with the trial would be held to be so material as to justify the discharge of the jury or the vacating of their verdict.

The issue of pressure on the jury arises really in two ways. The first is one of undue publicity which may be prejudicial to the accused. It has been the view of the courts in recent years that where this occurs in the general run of cases, publicity given to the trial or the accused can be countered sufficiently by a warning by the trial judge.³³ More difficulty is encountered with direct pressure on jurors to come to a particular verdict or to be affected in how they come to their decision. There again appears to be no direct authority in New Zealand, though the point has arisen in Australia and Canada. In the United Kingdom majority verdicts appear to have reduced the potential difficulties.

There are a number of reported Australian cases³⁴ where the issue of pressure on the jury has arisen. The modes of dealing with the issue have been diverse,³⁵ but the general principle of the cases is that the occurrence of an effort to pressure the jury is not of itself, any ground for terminating the trial — rather the reverse. “The administration of justice would come to a standstill if this court were to hold that a criminal trial could be aborted by the simple device of an anonymous telephone call to a member

²⁹ See *Prime* (1973) 57 Cr.App.R. 632 and *Sawyer* (1980) 71 Cr.App.R. 283.

³⁰ [1982] 1 NZLR 1.

³¹ *Binley & Walsh* (1912) 31 NZLR 949, 15 GLR 42.

³² *Wilson* [1954] NZLR 4.

³³ *Zampaglione* [1982] 6 A.Crim.R. 287 is a recent example.

³⁴ *Boland* [1974] VR 849; *Zampaglione*, *supra*; *Waring* [1972] QWN 20; *Thompson & Kossaris* [1982] 7 A.Crim.R. 468; *E.J. Smith* [1982] 2 NSWLR 608, 7 A.Crim.R.253; *Stretton & Storey* [1982] VR 251.

³⁵ Jurors may be asked if they wish and are able to continue (*Waring*, *supra*) or the jury may be generally warned to put aside any extraneous communications (*Thomson & Kossaris*, *supra*) or a juror may be separately questioned and warned by the judge (*Boland*, *supra*).

of the jury".³⁶ However, there is one authority holding that if a juror does feel threatened the jury should be discharged, since the juror would be incapable of bringing a 'calm and dispassionate judgment'.³⁷ This appears to have been the only case where there was evidence of a juror feeling intimidated, but insofar as the case indicates that a juror who is prepared to carry on in the face of threats whose force he has felt should not be permitted to continue, it is certainly out of line with other decisions of the same or equivalent Australian courts.³⁸ It is submitted that it should not be followed in New Zealand.

The Canadian authorities are scantier³⁹ but regard, in essence, the approach of the older Australian cases as correct in holding that threats to a juror cannot of themselves abort the trial. Where the Canadian authorities differ greatly is in determining the procedure to be used in deciding whether to discharge the jury or a juror. The critical difference is in regard to the right of the accused to be present, and where there have been threats or pressure on a juror, the accused must be given the opportunity to be involved in the decision as to whether the jurors can carry on. To determine the issue in his absence is a flaw vitiating the trial,⁴⁰ and one which cannot be cured by applying the proviso. Whether the same result would occur in New Zealand depends on the interpretation given to s.376 of the Crimes Act 1961. That section is of great relevance to a number of other issues canvassed above and it is to that section we should now turn.

II THE ACCUSED'S RIGHT TO BE PRESENT AT THE TRIAL

Section 376 of the Crimes Act provides that "(1) Every accused person shall be entitled to be present in court during the whole of his trial, unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable. (2) The court may permit the accused to be out of court during the whole or any part of any trial on such terms as it thinks proper".

This provision is not directly comparable with the Canadian legislation which provides that the "accused . . . shall be present in court during the whole of his trial" except where he has misconducted himself so as to make continuance of the proceedings impractical or the accused has sought permission to be absent or in certain cases, during consideration of his fitness to plead.⁴¹ This section is more clearly mandatory than the New Zealand section. It is suggested by Caldwell that the effect of s.376 is to re-enact the common law rule that required the presence of the accused in court at all stages of the trial and that despite the permissive nature of the wording of s.376 the effect is a mandatory one.⁴² It may be that the effect of the section is not quite as clear as this view would indicate,

³⁶ *Zampaglione*, [1982] 6 A.Crim.R. 287 at 294.

³⁷ *Stretton & Storey*, *supra*, at 255.

³⁸ *Zampaglione*, *E.J. Smith*, *Thompson & Kossaris* and *Waring* all appear to be contrary to the *Stretton* view.

³⁹ *Hertrich*, *Skinner & Stewart* (1982) 67 CCC (2d) 520; *Frisco* (1970) 14 CRNS 194.

⁴⁰ *Hertrich*, *Skinner & Stewart*, *supra*.

⁴¹ Criminal Code Act, s.577(1) and (2).

⁴² Garrow and Caldwell's *Criminal Law in New Zealand*, 6th ed., p. 361.

and that, in any case, the common law rule is not as clear as Caldwell would indicate.

The common law rule would appear to have regarded the presence of the accused at the trial as a privilege which could be waived expressly or by conduct. Thus a prisoner who escaped from custody during his trial could be regarded as having waived his right to be present and the trial could continue in his absence.⁴³ The discretion to allow the case to continue is however not absolute, but where the bulk of the Crown's case is completed before the accused's voluntary abandonment of the proceedings and/or a co-accused wishes the trial to continue, continuance is justified.⁴⁴ It may well be that continuance of the trial in the absence of the accused is permissible in circumstances other than voluntary abandonment by the accused of his right to presence. In *Howson*⁴⁵ the Court of Appeal indicated that if sickness caused the absence of the accused during a major part of the trial or during the giving of critical evidence, the trial of that accused must be aborted and a fresh trial held at a later stage. However the court indicated that pragmatic considerations must limit the scope of this principle and if no serious prejudice is done to the accused by his absence it may be at least condoned.

It does, however, seem that in practice the common law rule related only to the presence of the accused during the parts of the trial concerned with the hearing of evidence, the summing up to the jury (including any supplementary instructions) and the taking of the verdict and sentencing. It does not appear to apply to the investigation of collateral issues such as possible disqualification or discharge of a juror. Thus a judge may validly discharge a juror on compassionate grounds without informing either prosecution or defence⁴⁶ or may question a juror who has given information to the judge of threats issued to him without informing counsel — at least if the issue of threats to the jury has been earlier canvassed in open court.⁴⁷ These decisions do not represent the normal procedures of the courts, but they appear to be within permissible limits. The apparent basis is that questions as to the fitness of a juror or the jury do not contribute to the resolution of the principal issue in contention between prosecution and defence.⁴⁸ This reasoning is at best doubtful.

The Canadian cases take a dramatically opposed position. It is clear that s.577 of the Criminal Code is taken to require the presence of the accused of any steps relevant to the procedures for determining guilt or innocence. These will include the empanelling of the jury and enquiries as to the possible discharge of any juror⁴⁹ and this requirement of the accused's presence is not observed by presence of counsel for the accused — he must be personally present.⁵⁰ Failure to observe the statutory

⁴³ *Jones (No.2)* (1972) 56 Cr. App. R. 413, [1972] 1 WLR 887; *McHardie & Danielson* [1983] 2 NSWLR 733.

⁴⁴ *McHardie & Danielson, supra.*

⁴⁵ (1981) 74 Cr. App. R. 172.

⁴⁶ *Richardson* [1979] 3 All ER 247.

⁴⁷ *E.J. Smith, supra.*

⁴⁸ *Ibid.* at 613.

⁴⁹ See *Hertrich, Skinner & Stewart, supra* and the cases discussed therein, esp. at 528-529.

⁵⁰ *Dunbar & Logan* (1982) 138 DLR (3d) 221, Ontario CA.

requirement goes to the jurisdiction of the court and cannot be cured by reference to the proviso on appeal — though there is no nullity grounds in the Canadian equivalent of s.385 of the Crimes Act.

What then is or should be the New Zealand position? The general trend of the New Zealand decisions is to follow English procedures⁵¹ and thus it would appear that the courts might be prepared to deal with ancillary matters in the absence of the accused. The courts in this country have insisted that all important communications with the jury take place in open court in the presence of the accused⁵² though it seems that purely procedural issues such as enquiries as to whether a verdict will be likely to be reached before the time for a meal may be made without reference to counsel or the accused.⁵³ It is submitted that the requirement of openness that is recognised to apply to all important communications with the jury as a whole in England, New Zealand and Australia⁵⁴ ought to extend to questions of discharge of individual jurors or the discharge of the jury as a whole. As is indicated above, this would appear to conflict with English and Australian procedures, but it is hard to see that the discharge of a juror other than in open court can be other than a breach of the general rule requiring matters to be dealt with in open court. It is submitted that the application of s.376 of the Crimes Act makes the argument in this sense stronger. Any questions involving the continuance on the jury of a person who might be likely to be affected in his consideration of the case by such matters as prior knowledge of the accused or threats or pressure applied to the juror or jury involves the question of whether a fair trial can be had if the juror continues to sit. In essence, this is for the accused part of the question of whether he is being properly tried, and he has the right to be present.⁵⁵

It may be noted that s.376 only refers to the presence of the accused "in court".⁵⁶ This might allow an argument that proceedings in chambers need not be in his presence and that therefore no infringement of the section occurs where discharge of the jury or a juror is considered in chambers. It is submitted that such a distinction would be specious — much might then turn on whether the judge retired to his chambers to discuss the matter or whether he discussed it in the courtroom with the jury excluded. It is suggested that the statutory principle ought to apply to the resolution of all issues which impinge on the determination of guilt or innocence whether or not they take place in chambers or the courtroom.⁵⁷

There are, however, other difficult questions arising as to the ambit of s.376. The first is whether it has any application to questions arising on the empanelling of the jury. The judge there has the power to determine challenges for cause in such manner as he thinks fit. Need this be done

⁵¹ See, e.g. *George* (unreported CA 249/83, judgment 21.2.84, at p.13).

⁵² *Zamparutti* [1973] 2 NZLR 151.

⁵³ *George, supra*. 54. See e.g. *Townsend* [1982] 1 All ER 509; *Fitzgerald* (1889) 15 VLR 40; *Zamparutti supra*.

⁵⁵ See the argument of Martin JA in *Hertrich, Skinner & Stewart, supra*, at 539.

⁵⁶ It is clear that the principle of the accused's presence extends to views which take place outside the courtroom. It is therefore logical that the right to presence extends to chambers proceedings outside the courtroom.

⁵⁷ *Dunbar & Logan, supra*.

in the presence of the accused? There is no clear authority. It is submitted that the Canadian view that any matter connected with the empanelling of the jury requires the presence of the accused is a desirable one. The expectation of any accused must be that he sees for himself the selection of the persons who are to decide his guilt or innocence, and he would have a genuine cause to consider proceedings unfair if he was not a party to the procedures whereby the jury were selected. The discretions given by the Juries Act ought to be governed by this element of procedural fairness, and indeed it is a discretion which, when exercised in the District Court, might be reviewable in the High Court on administrative law principles. The principle adopted should be consistent for all jury trials so it is submitted that if in the District Court a right to presence is established, the same rule should be adopted in the High Court, notwithstanding the general rule that a High Court Judge's exercise of a discretion is not reviewable.

It is possible to raise the countervailing argument that s.25 of the Juries Act lays down that the decision of a challenge for cause shall take place in chambers; and the accused would not normally be present in a discussion in chambers. It appears that in Canada the accused must be present on discussions in chambers where these relate to significant issues during the trial. It is submitted that to distinguish between chambers and court here would be as illogical as it would be in cases arising during the trial; the arguments as to that have already been canvassed.

Before leaving this point, it must be noted that the right to *presence* is not the same as the right to *present argument*. It is clear that even if the accused is informed, as he should be, of communications from the jury, there is no obligation on the judge to seek submissions from either Crown or defence as to the course to be followed.⁵⁸ It is, however, unlikely that refusal to allow the defence to make submissions on certain matters, (as, for instance, whether a juror should be disqualified for lack of impartiality) could be treated by the courts as other than an irregularity. It might be curable by reference to the proviso to s.385, but it is difficult to see how a jury verdict reached by a jury which included a juror whose impartiality or ability is doubtful could be upheld except in the clearest of cases.

III THE JURY'S DELIBERATIONS

Once the jury has retired to consider its verdict, the rules regarding contact with the jury become both more stringent and less uncertain. Contact between other persons and the jury should be as limited as possible, and such court staff as have contact with the jury must act as no more than mere conduits for the passage of information from the Judge to the jury.⁵⁹ The involvement of non-jurors to any further extent may in effect vitiate the whole proceedings, despite the provisions of s.370(3). As Adams indicates,⁶⁰ it is difficult to see how an irregularity justifying discharge of the jury prior to announcing its verdict if it had been discovered at that point can cease to be a vitiating element if discovery does not occur before the verdict is taken.

⁵⁸ *Zamparutti, supra*, is a good example of statements of this principle.

⁵⁹ *George, supra*, is the latest restatement of this old rule.

⁶⁰ *Criminal Law and Practice in New Zealand*, 2nd ed., para. 3067.

There is clearly power in the court to control all information received by the jury during their deliberations, and only in exceptional cases can the jury be left with the possibility of acquiring further information without direct control by the court.⁶¹ If the jury require further information this must be requested of the trial judge and the answer, be it refusal to supply the information or not, must be given in open court and in such a way that the accused knows what requests the jury have made.⁶²

There are two specific matters which do raise more limited questions which may be of concern in a number of cases. The first is where the jury indicates that it is having difficulty in reaching a verdict; the second, and at times interlocking, case is where deliberations of the jury have extended for a considerable period of time.

A difficulty in arriving at a verdict may occasionally be because of a misunderstanding of the issues before the jury⁶³ and any communication showing such a misunderstanding may necessitate a re-charge as to the critical elements. If, as is more common, the jury have understood their task but find difficulty in reaching agreement, the judge may instruct them as to the desirability of attempting to find a unanimous verdict. Where there is such a difficulty, the jury may be given directions as to reconsideration of their positions,⁶⁴ but the charge must not weaken the requirement of genuine agreement on the verdict by all of the jurors.⁶⁵ The judge is not bound to accept a statement by the jury as to their position, but if he sends them back for further deliberation and a radically different verdict is given, this may be challengeable.⁶⁶

If the jury indicate an inability to reach an unanimous verdict, they may be discharged without reconsideration. The judge must be careful to ensure that a position of deadlock exists and may not phrase his questions as to lack of agreement so as to encourage the jury to report inability to agree where there is a real possibility of agreement given further time for deliberations.⁶⁷

Linked to this issue often is the length of the jury's deliberations the judge may discharge after 4 hours, if he thinks fit,⁶⁸ but this is clearly only a lower limit. The mere length of deliberations is not, in itself, a ground for challenge.⁶⁹ However, if the jury have not expressly been informed of their right to disagree and there is some element in the proceedings which may have indicated to the jury that they would be kept in deliberation until a verdict is reached, length of time may be relevant as evidence of the verdict being unsafe and unsatisfactory.⁷⁰

⁶¹ An example of such an exceptional case is *Dempster* (1980) 71 Cr. App.R. 302.

⁶² *Zamparutti*, *supra*.

⁶³ See, e.g. *Ford* [1978] 2 NZLR 258; *Rafique* [1973] Crim LR 777.

⁶⁴ See *Papadopoulos* [1979] 1 NZLR 621, and *George*, *supra*.

⁶⁵ *Patterson* [1980] 2 NZLR 97, *Gibson* (1983) 77 Cr. App.R. 151.

⁶⁶ *Townsend* [1982] 1 All ER 509 where a majority verdict for acquittal was not accepted and unanimity on a guilty verdict was reached after further consideration.

⁶⁷ *Katavich* [1978] 1 NZLR 63.

⁶⁸ Crimes Act 1961, s.374(2).

⁶⁹ See e.g. *Papadopoulos*, *supra*, *Carstairs & Sneller* (unreported CA 176/83 and 178/83, decn.19.8.84); *E.J. Smith* [1981] 7 A.Crim.R.253.

⁷⁰ This seems implicit in the approach of the Court of Appeal in *Carstairs & Sneller*, *supra*.

However, if rather than allowing continuance of the jury's deliberations, the judge places pressure on them to reach a verdict within a certain time, the verdict is highly likely to be vitiated. In *George*⁷¹ the Court of Appeal reaffirmed the importance of the rule relating to time limits.⁷² The jury must not be hurried, but may, in the judge's discretion, be reminded that he may discharge them if they cannot reach agreement. This must be done in open court, though it appears that enquiries as to whether progress is being made can be forwarded by the judge through the Registrar without counsel being consulted in appropriate cases. There does not appear to be any requirement that counsel be consulted as to the desirability of prolonging deliberations, though it appears that this is a common practice.⁷³

IV RENDERING THE JURY'S VERDICT

There are two areas of difficulty here. The first is as to the point at which a jury's function is concluded and no further steps to resolve any ambiguities or inconsistencies latent in the verdict can be taken. The second concerns the verification of its unanimity.

This article does not consider the law relating to inconsistent or ambiguous verdicts.⁷⁴ Where a verdict is given which is or may be inconsistent or ambiguous, the judge may make inquiry of the jury as to the true meaning of their verdict or give appropriate directions to them as to the issues involved and send the jury back to deliberate further⁷⁵, even though the verdict might be interpreted as one of not guilty.⁷⁶ It is not completely clear whether the judge can insist on a verdict which is unambiguous. One writer states the judge may insist on a simple not guilty or a guilty verdict⁷⁷ but in *Sorby* the Court of Appeal appeared to recognise a right of the jury to insist on the original form of their verdict.⁷⁸ It is also not clear whether, if this latter right exists, the jury must be reminded of it. It is submitted that any power to insist on a clear verdict of guilty or not guilty is restricted to cases where the verdict as first given would be interpreted as one of guilty. If the verdict is one which is truly ambiguous and thus indicates that there is a possibility of at least some jurors being in favour of acquittal, the judge may seek clarification of the verdict but should remind the jury that they have a right to insist on the form of their agreement. If there is real disagreement among members of the jury this will be likely to surface on further deliberation and the judge can then deal with matters in the normal way. There appears to be no authority directly in point authorising this procedure, but it is submitted that the trend of the authorities is to

⁷¹ CA 249/83; decn. 21.4.84.

⁷² As to which also see *Rose* [1982] 2 All ER 536; 75 Cr.App.R 322 and *Mckenna* [1960] 1 QB 411.

⁷³ This is drawn from the dicta in *George* which will be of considerable importance in any jury trial cases in New Zealand.

⁷⁴ As to which see Adams, Criminal Law and Practice in New Zealand paras.3107-3112, *Perrott* (unrep. CA 120/82, 22.4.83) and *Pomeroy* (unrep. CA 84/83, 19.8.83).

⁷⁵ *Sorby* [1976] 2 NZLR 516.

⁷⁶ *Ford* [1978] 2 NZLR 258.

⁷⁷ Garrow and Caldwell, *op.cit.*, p. 354, citing as authority *Hill* [1954] NZLR 117 and *Moore* (1931) 23 Cr. App.R 138. These cases do not appear to establish the proposition for which they are cited.

⁷⁸ [1976] 2 NZLR 516 at 519.

ensure that no chance of an acquittal which might fairly have been open to the accused should be precluded by the intervention of the judges.

However, once the verdict of the jury is given and accepted by the judge (correction of mere verbal slips apart)⁷⁹, the jury is *functus officio*, the verdict as taken by the judge must therefore stand and no further steps can be taken to clarify the verdict.⁸⁰ If the verdict taken is ambiguous and a chance of acquittal is lost because no steps to clarify the verdict were taken, a new trial should not be ordered⁸¹, but it is unclear what the position would be should the jury insist, despite requests for clarification, on a verdict which is unsatisfactory. It is suggested, in the absence of authority, that the verdict taken must be set aside and a new trial ordered.

A final matter which is concerned with the taking of the verdict is ascertainment that the verdict is truly unanimous. The Court of Appeal has accepted that in exceptional cases a jury poll may be ordered⁸² but has not given clear guidelines as to when the discretion to allow a poll should be exercised. In effect it appears that only if a juror indicates lack of agreement by replying in the negative to the standard question of unanimity or there is something in the demeanour of a juror showing a possible lack of agreement should a poll be considered. No guidelines are suggested as to the procedure following the decision to take a poll. It is submitted that considerable assistance can be derived from the Canadian authorities as jury polling is not uncommon in that country. It appears that the Canadian cases have laid down as the test for whether a poll should be granted no more precise test than that formulated in New Zealand — it is one of the judge 'assuring himself that there is no misapprehension' as to unanimity.⁸³ Once a poll has been requested, each juror must be asked for his verdict and the answer duly recorded. Should there be a clear lack of agreement, the jury may be instructed to retire for further deliberations and then the verdict be taken. The judge may give fresh directions on the relevant law, but is not obliged to do so.⁸⁴ Once the poll is taken and all jurors have indicated agreement, that verdict should stand and the jury cannot be requested to reconsider the issues.⁸⁵

V CONCLUSION

As this article has attempted to illustrate there are some areas of the law relating to jury verdicts which remain surprisingly unclear in New

⁷⁹ *Bateson* [1969] 3 All ER 1372.

⁸⁰ *Sorby, supra*.

⁸¹ *Ford, supra*.

⁸² *Papadopoulos (No.2)* [1979] 1 NZLR 629.

⁸³ *Ford* (1853) 3 UCCP 209, 218, recently reaffirmed by the Supreme Court of Canada in *Laforet* (1980) 50 CCC (2d) 1. There is no 'right' in either Crown or defence to a poll — *Recalla* [1935] 4 DLR 353, 64 CCC 276; OR 479.

⁸⁴ *Laforet, supra*. Estey and Dickson JJ dissented in part, holding that in cases such as that one, where the verdict in question was as to an included offence and the poll indicated a possible misunderstanding of the law by a juror, further directions on the law should be given.

⁸⁵ *Thomas* (1983) 5 CCC (3d) 464 — an unusual case in that the jury, on a poll, returned a guilty verdict and were then sent back to reconsider their decision and returned with a verdict of acquittal. The Quebec Court of Appeal held that the first verdict given was the true verdict but in the circumstances ordered a retrial.

Zealand. The deficiencies in the Juries Act 1981 may be remediable by reference to other areas of law, but it is clear that a reform of the law relating to jury selection would not be amiss. There may also be a need for further provision to deal more specifically with other matters relating to the jury, especially in regard to cases where information prejudicial to the accused has come into the hands of a juror. In cases such as this, where there is no uniformity among the Commonwealth courts, legislative intervention may be needed. There may be some areas where problems not resolvable by reference to legislation may be dealt with by reference to the practices of overseas courts, but in other areas, as the discussion in relation to s.376 of the Crimes Act indicates, there may be difficulties in ascertaining what the true position is or ought to be. A review of the law in this area would not be unjustified or premature.