"I swear to -- a true verdict give"

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"I swear to well and truly try and true deliverance make between our sovereign lady the Queen and the accused at bar, whom I have in charge and a true verdict give, according to the evidence so help me God."

--Juror oath

Most people have seen movies or television programs with fascinating jury scenes, many of them American. But our Canadian juries are in the news today, with yet another juror now getting to know an accused personally, this time after the fact. Juries are a fundamental component of our justice system, yet we seem to know very little about them and how they operate. This article describes qualifications, selection, and the work of jurors in Canada.

Theory of Juries

The courts and their processes are part of the judicial branch of government, and through juries, citizens participate directly in the judicial process. Thus, the jury is a fundamental institution of a democratic society, the process by which society resolves legal disputes between citizens and the state and between citizen and citizen. Juries exist because our society believes that some cases are appropriate for ordinary people, who are not politicians, lawyers, or judges, to make decisions about justice.

Jurors are finders of fact in a trial; this is to say, they determine what happened after hearing all of the evidence. They apply all of those facts to the law (described to them in the charge by the judge), and render a legal conclusion of whether liability exists. In Canada, juries do not actually decide on the criminal sentence, but they can make recommendations on parole eligibility.

Civil Juries

Juries in civil (non-criminal) cases are possible, but rare. This is unlike the high proportion of civil jury trials in the United States where even civil juries are a constitutional right. Some provinces restrict which cases can be tried by a jury. Cases against municipalities and the Crown, for example, cannot. Indeed, few civil juries are summoned here, both because many civil lawyers do not enjoy the drama of arguing to a jury, and because the private parties have to pay for them. Moreover, a jury doubles the amount of total time needed for a trial.

Criminal Juries

Any person charged with an offence where the maximum punishment is five or more years' imprisonment has the right to trial by jury (Charter of Rights, s. 11(f)). It is easy to find a criminal jury trial taking place during the week in courthouses of large cities.

Source of Jury Law

The law governing criminal juries is set out in sections 626 to 653 of the Criminal Code, in provincial jury legislation, and in judicial decisions interpreting these provisions. This law is summarized here.

Qualifications and Exemptions

The minimum qualifications for jurors are that they be resident one year in their province, be Canadian citizens, and at least 18 years of age. However, all publicly elected politicians, judges, lawyers, coroners, persons confined to an institution, and all persons working in the justice system, such as police and probation officers, are disqualified from serving on a jury.

While some people curse a jury summons when they get one for the time it will take, there is a public interest in keeping the pool of prospective jurors as random and representative as possible of the community. If all college students complained that they needed to attend classes, or all workers that they needed to work, there would be nobody from these categories, and only those who wanted to be jurors would be -- an un-representative group.

People served with a jury summons, who are not disqualified, may want to be exempted from jury duty. There is a long list of factors that exempt a person summoned for jury duty. This includes individual private interests such as having objections due to conscience or religion, having served on a jury within the last two years, being unable to understand the language of the trial, being 65 or over, of finding that jury duty would cause a "severe hardship" to health, livelihood, or any legal or moral obligations, or physical, mental, or other infirmity. One can also be excused from jury duty where it is in the public interest because one has urgent or essential services of public performance that cannot reasonably be rescheduled or performed by someone else.

If one wants to be excused from jury duty, one can apply to the sheriff at the courthouse. If the sheriff refuses the exemption, one may appeal to a judge, including the judge conducting the jury selection.

Jury Selection Process

The name, panel number, and place of residence of each member of the jury panel is placed on a card and delivered by the sheriff to the clerk of the court. The cards are placed in a box, mixed, and drawn from the box one at a time. The clerk calls each prospective juror's name until there are sufficient persons, in the opinion of the judge, to provide a full jury.

Judges will frequently canvass the jury panel prior to jury selection as to any reasons why its members may not bc able to adhere to their oath. Yet, the biggest challenge to prospective jurors

will be the parties' lawyers with their challenges. An accused charged with the most serious offences (such as murder) has 12 to 20 peremptory challenges. All other accused have four. While the prosecution is entitled to only four peremptory challenges, it may stand aside any number of prospective jurors up to 48 without any special reason. (Lawyers will ask a juror to stand aside simply because they have a gut reaction about a juror; there are no questions asked in the peremptory challenges or stand asides).

In addition to peremptory challenges, any juror can be challenged for cause. This is to eliminate from the jury persons who are not indifferent (do not have opinions favouring one side or the other) as between the Crown and the accused. The right to a challenge for cause exists in any stage of the jury selection process, and it is not necessary that the accused exhaust his peremptory challenges prior to challenging for cause. A challenge must bc made before the jurors are sworn.

Once a lawyer has challenged a juror, a kind of mini-trial takes place. Challenges are tried by either the last two jurors sworn, or two panel members are sworn for that particular purpose. The most common ground upon which a juror is challenged for cause is that the juror is biased. In questioning the prospective juror, lawyers may only ask questions about the particular problem, and must not use the challenge as a means of indoctrinating or influencing the jury or for the purpose in determining the personality, beliefs or prejudices of any juror. A juror's prior knowledge of the case is not conclusive of any partiality even where a tentative opinion has been formed. If the challenge for cause fails, the challenger still has available the peremptory challenge or the stand aside. Overall, the jury selection process is designed to produce representative and fair juries, not favourable ones for any side.

Once the pool of prospective jurors is exhausted by challenges or stand asides, those stood aside are recalled. Although they can then be challenged, they cannot be stood aside a second time. If all jury candidates are eliminated without a full jury, the court may, through the sheriff, summons people by word of mouth to add to the jury panel. These people, called talesmen, can be called off the sidewalk outside the courtroom door and put on the jury. Since the pool of juror candidates (panel) is so large, this rarely is necessary although one should be prepared for the possibility when casually strolling past the courthouse.

Discharge After Selection

A juror can be dismissed for several reasons. These may be divided into non-culpable and culpable reasons. When during the course of a criminal trial a juror is unable to continue due to illness or other reasonable cause, a judge may discharge that juror, but the jury is still seen as properly constituted provided that its number is reduced to no fewer than ten. This is a non-culpable reason.

Culpable reasons have to do with misconduct on the part of the juror. Those who participate in the judicial system must be free from all outside pressure so as to be able to render their judgments freely and impartially. They must also ensure, to the extent humanly possible, that in the execution of their duties they are not influenced by any improper personal interest.

Fundamental to the administration of justice is the need to maintain the integrity of the jury system.

Perversion of the judicial process can lead to the discharge of an individual juror and of the entire jury. Even slight improprieties will not be tolerated. In the recent Ontario case of Briggs (December 1999), a drug trial had proceeded for one week. The lawyers were about to start closing arguments. Over the weekend, the judge received a letter signed by all twelve jurors. They complained that the Court Clerk sent amorous notes to one of the jurors. The judge declared a mistrial and dismissed the jury. The accused was not re-tried.

The most notorious recent case involving juror misconduct was the Gillian Guess case. During the longest criminal jury trial in BC, the accused made seven calls to a juror's residence during the trial and one call within two hours of the acquittal. He came to her house during the trial, and they had an affair. The juror said: "He's majorly putting on the vibes, majorly coming onto me." The court found that the mere fact of that relationship, without more, constituted a flagrant violation of her oath as a juror sworn to be impartial as between the accused and the Queen.

Since this conduct was not disclosed until after the trial in which this accused was acquitted, the Crown considered that the conduct of the juror, by having that personal relationship, caused a fundamental and gross distortion in the administration of criminal justice, a criminal act. She was convicted of obstructing justice and sentenced to 18 months in jail. One might also ask why this accused who was free on bail during a murder trial was also not committing an offence by having an affair with a juror.

At any time before a verdict is given, the judge may declare a mistrial and discharge the jury if it appears there is a miscarriage of justice.

Charges to the Jury

After all evidence has been given, arguments made, and legal procedures completed, the judge charges the jury; that is, explains the law and their tasks. Jurors have the task of deciding what are the facts, and then applying them to the law. However, as lay persons, they do not have knowledge of the intricacies of the criminal law: what are the parameters of criminal offences and what qualify as legal defences. The judge must explain the law and the jurors' options to them in the charge. If the charge is deficient in some way, often the verdict will be appealed, and a new trial may be ordered.

There is no hard and fast rule respecting the nature of a charge to the jury; each charge must bc regarded in light of the facts of the case. However, an essential part of the charge to the jury consists of direction by the judge that the jurors are the sole triers of fact but that they must accept his/her instructions on all matters of law.

In reviewing the evidence, the trial judge has the right to express an opinion on any point provided he or she makes it clear that the ultimate decision respecting those points remains with the jury. In directing the jury as to the law, the judge must explain the requirement that the Crown establish its case beyond a reasonable doubt and that if the jury has such a doubt, the

accused must be acquitted. The judge must avoid any indication that the accused needs to prove innocence.

It is also essential that the trial judge bring to the attention of the jury all available defences as disclosed by the evidence -- for example, the defence of self-defence in an assault case. Failure to direct adequately the attention of the jury to these defences could result in a new trial.

The judge must direct the jury to evidence requiring corroboration by other evidence. The judge will point out what independent evidence may corroborate other evidence and leave it to the jury to decide if it does. Although no corroboration is required, it is necessary to warn the jury to be cautious in assessing the testimony of an informant who has a bad reputation. The jury must be instructed to weigh carefully the evidence of an eyewitness where identification is in issue.

Where the evidence tends to prove only the offence charged, the judge need not charge the jury on included offences. But if there is any evidence upon which a jury might convict for an included offence, (such as manslaughter included in the offence of murder) the judge has a duty to charge the jury with respect to that offence.

In charging the jury in a case involving multiple accused or multiple counts, the judge must assist the jury to separate the evidence as it applies to each count and each accused. In charging the jury respecting expert evidence, the judge may guide the jury on hearsay evidence. He must also inform the jury which evidence is hearsay, and which evidence is not hearsay. Other areas of the evidence which may require special caution by the judge are alibi evidence, similar fact evidence and the evidence of police informers. If the judge refuses the jury's request to reiterate the theory of the defence, or fails to direct the jury to any strong evidence in favour of the accused, this may amount to misdirection and a new trial may be ordered on appeal.

Decision-Making

Once the jury has been charged and retires to consider its verdict, there can be no separation of jurors and they must remain together in the room appointed for deliberations. Jurors may take into the jury room only those materials admitted into evidence, although the jury may receive copies of the Criminal Code, especially when requested. The judge should caution the jury that they must still follow his instructions on the law. It is improper to provide the jury with a written portion of the charge to the jury. Where the jury requests that portions of evidence be read back, the request is granted, along with relevant cross-examination sections, and carried out in open court with notice to all counsel and in the presence of the accused.

While no artificial time limits are placed on jury deliberations, a judge may reasonably inquire into and exhort the jury on those deliberations. Where the judge is satisfied that the jury is unable to agree upon its verdict and that further deliberations would be useless, he may discharge the jury.

Appeals on the basis of Jury Irregularity

Convicted persons frequently dispute the jury verdict of guilt for a variety of reasons having to do with jury procedures, or where the charge or exhortations of the trial judge to the jury are questioned. The appeal court reviewing them looks at whether an error was made and whether it could have seriously misled the jury. If so, this leads to a new trial. This system places high demands on trial judges.

Recent Canadian studies suggest that jurors do not necessarily understand and apply what they are told in the charge. They may not be seriously influenced by some of the legal mechanics which are technically in error. Again there are several general curative provisions in the Criminal Code that allow mistakes with juries to pass without invalidating the entire proceedings. Only in cases where the error likely led to a miscarriage of justice, will a new trial be ordered.

After a jury returns a verdict it is discharged. It is not a legal requirement that the jury be polled (individual verdicts stated). This may be done where there is doubt regarding unanimity.

Deliberations Cannot be Disclosed

Jurors could be cautious and thoughtful in their decisions or could flip a coin. No one outside the jury room may ever know. Such is the sanctity of jury deliberations.

The rule that jury deliberations are sacrosanct and can never be received in evidence began as judge-made law. The first reason for this rule is that there should be a degree of finality to verdicts. They should not be constantly re-opened because of disclosures by jurors about their deliberations. Most cases would seek to review jury verdicts in this way.

The other reason that is given is the need to protect jurors from harassment about their verdicts. This common law rule was first codified in the Criminal Code in 1972. No juror is to disclose the nature or content of the deliberations in the jury room, and such disclosure is an offence punishable on summary conviction. The secrecy of jury deliberations is reinforced by making it not only a protection for jurors but also by making its violation by a juror a criminal offence. The insider tells all books that emerged in the aftermath of the O.J. Simpson criminal trial would have to be circumspect in Canada. This non-disclosure rule reminds us that jury service is a public duty, not an invitation to juror aggrandizement.