
**THE CONTINUING RELEVANCE OF THE JURY SYSTEM
IN THE ENGLISH SPEAKING CARIBBEAN**

**Third Annual Distinguished Jurist Lecture
Of the Trinidad and Tobago Judicial Education Institute**

**By
Sir Marston Gibson, K. A.
Chief Justice of the Supreme Court of Barbados**

*11 July, 2013
Port-of-Spain, Trinidad*

Introduction

Let me commence by first expressing my deepest gratitude to the Judicial Education Institute of Trinidad and Tobago for inviting me to deliver their Third Annual Distinguished Jurist Lecture.¹ The efforts of the Trinidad and Tobago Judicial Education Institute to fulfill their mandate to promote excellence in the administration of justice through continuous training of judicial and non-judicial officers must be commended. I specifically applaud the foresight directing their decision to host annual public lectures with an accompanying panel discussion on current legal topics relevant not only to Trinidad and Tobago but to all the jurisdictions of the Commonwealth Caribbean. Such a venture not only contributes to the jurisprudence of our region, but stimulates discussion and discourse that can surely benefit all of us, not only of this generation but of generations yet to come.

It is thus with both honor and humility that I accept a role in this initiative, doing so, I am aware, in the shadow of two of the most renowned legal minds that our region has currently produced. Although this initiative is still in the early years of its inception, the topic on which I have been asked to speak today is not. And in part because of its age, as well as the considerable attention it has consistently received, like Lord Devlin many years before me, I fear that this subject is not one on which “*it is possible to say anything very novel or very profound*”.²

Trial by jury and its continuing relevance to the Commonwealth Caribbean is the subject on which I am asked to address you. Although my topic is not constrained to trial by jury for criminal proceedings, and although trial by jury is still available in some jurisdictions in the civil sphere, civil jury trials have virtually disappeared in all but a few cases and my discussion will therefore be limited to the jury as it operates in the criminal system.

Jury trial is one manner of determining the guilt or innocence of a person accused of an offence; it is reputed to have a lengthy lineage. Its history precedes both the European discovery of our islands and the political independence that most of us subsequently obtained. But although we politely requested, and had unlocked, the political shackles of English colonialism that at one

¹ I want to take this opportunity to publicly thank my Judicial Assistant, Ms. Sumaya Desai, Attorney-at-Law, for her invaluable assistance to me in putting together this lecture.

² Sir Patrick Devlin, *Trial by Jury* (London: Stevens & Sons Limited, 1956)

time bound our nations, none can deny that our colonial heritage has been the primary force shaping the contours of our legal landscape and it is the reason why we currently bear this ancient institution fashioned, it must never be forgotten, not by the customs of the peoples of this region, but inherited from, or perhaps bequeathed by, those that once colonized/ruled us.

Given the learned audience which I address, a definition of jury may be entirely unnecessary. You are all aware, I am sure, that a jury refers (at least in the common law tradition to which we belong) to a body of ordinary persons, usually twelve in number for capital offences and fewer in number for less serious offences, who are selected from a larger number summoned by the state and entrusted with the duty of inquiring into matters of fact in a particular trial in order to return a verdict solely based on the evidence that has been properly admitted before them.³

Using a jury to represent the conscience of the community to try someone accused of a crime has from quite early on attracted both praise and criticism.⁴ Indeed, few other legal institutions as well-established as trial using a jury have attracted such passionate polarizing views, inspired more perhaps by emotions than scientific logic or reason. Lord Camden proclaimed the jury to be “*the foundation of our free constitution*” without which “*the whole fabric will moulder to dust*”.⁵ Thomas Jefferson, principal author of the American Declaration of Independence and the third President of the United States of America, declared that like equal and exact justice to all men and freedom of religion and freedom of the press, “*trial by juries, impartially selected*” formed part of “*the bright constellation which has .. guided our steps through an age of revolution and reformation; the wisdom of our sages and the blood of our heroes*”, he declared, “*have been devoted to [its] attainment*”.⁶

However, his fellow countryman, Mark Twain was not of like mind. The author and social commentator cynically described the jury system as “*the most ingenious and infallible agony for defeating justice that human wisdom could have devised*”. In his views he was joined by Judge

³ See *Black's Law Dictionary (Ninth Edition)*

⁴ Christopher Granger et al, *Canadian Criminal Jury Trials* (Toronto: Carswell, 1989) p. 3-6

⁵ Richard Ward, *Walker & Walker's English Legal System* (London: Butterworths, 1998) p. 230

⁶ Thomas Jefferson, *First Inaugural Presidential Address*, March 4, 1801. Available at: http://avalon.law.yale.edu/19th_century/iefinau1.asp

Jerome Frank who considered the jury to be “*the weakest spot in [the] judicial system,*”⁷ and cited a quote by a fellow jurist, Judge John Carter, who suggested that:

“...our boasted trial by jury which affirms that all grades of capacity above driveling idiocy are alike fitted for the exalted office of sifting truth from error may excite the derision of future times.”⁸

The contradictory views on this ancient institution have as yet failed to converge. Just as Britain announced in 2010 that, for the first time in four centuries, it had completed its first trial of an indictable only offence that was tried before and determined solely by a judge⁹ and as Belize follows closely in the steps of our former colonial master,¹⁰ jury trials or a version thereof are being introduced for the first time in the former Soviet Republic of Georgia, the People’s Republic of China, Japan and Mexico.¹¹ And having been reintroduced into Russia by the judicial and constitutional reforms of former President Boris Yeltsin scarcely more than a decade ago, the government of President Vladimir Putin has now sought to severely curtail its availability.¹²

These legal and political developments occur amidst unceasing advancements in technology and the capabilities and use of the cybersphere, most prominently in the form of social media (a term unknown a few years ago) which increasingly infringe upon the principles on which jury trial in England and hence our jurisdiction have been founded. It is against this backdrop that I am asked to consider whether the system of trial by jury remains relevant to our jurisdictions or

⁷ Judge Jerome Frank, “Something’s Wrong with our jury system” *Collier’s Weekly*, December 9, 1950 at p. 64. Available at: <http://www.unz.org/Pub/Colliers-1950dec09>

⁸ John Carter cited in Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, 1963)

⁹ Mark Hughes “Armed raiders jailed after trial without jury” *The Independent* March 31, 2010. Available at: <http://www.independent.co.uk/news/uk/crime/armed-raiders-jailed-after-trial-without-jury-1932167.html>. See also Barry James, “Trial by Jury: 800 year English Tradition in Jeopardy”, *New York Times*, July 9, 1993. Available at: <http://www.nytimes.com/1993/07/09/news/09iht-jury.html>

¹⁰ “Second trial by judge gets underway” *The EL Guardian* January 13, 2013. Available at: http://www.guardian.bz/index.php?option=com_content&view=article&id=5817:second-trial-by-judge-gets-underway&catid=39:crime&Itemid=73

¹¹ “The Jury is Out” *The Economist* February 12, 2009. Available at: <http://www.economist.com/node/13109647>

¹² Nick Holdsworth “Russia scraps right to jury trial” *The Telegraph* December 12, 2008. Available at: <http://www.telegraph.co.uk/news/worldnews/europe/russia/3725300/Russia-scraps-right-to-jury-trial.html>

whether the time has now come for us to slowly but surely eliminate this method of determining the guilt or innocence of an accused person.

Where was it born and what was its aim?

To truly understand and appreciate trial by jury as it operates in our legal systems today, it is necessary to have some familiarity with its origin and history and how it came to arrive upon our shores.

It must be stated at the outset, however, that there is no definitive consensus as to the precise origin of jury trials and how they evolved into the form they take today. One legal historian of some repute declared in his treatise on the jury system that "*few subjects have exercised the ingenuity and baffled the research of the historian more than the origin of the jury.*"¹³

While the true origin and evolution of the jury remain elusive, there are certain facts that are generally undisputed. First, it is clear that the jury, albeit not in the form it currently exists, can be traced back several centuries. It is not, however, traced to Magna Carta as a surprising number of people seem to believe. The article of Magna Carta credited with establishing the right to a trial by jury is article 39, which provides as follows:

"No freeman shall be seized or imprisoned, or dispossessed, or outlawed, or in any way destroyed, nor will we condemn him to prison, excepting by the legal judgment of his peers, or by the laws of the land."

Yet while Magna Carta was an important historical document by which the English monarch recognized that his authority could not be exercised arbitrarily, to give it the honor of instituting the jury system is baseless, regardless of how widespread this delusion may be. Magna Carta was the Great Charter that King John was required to sign in 1215 at Runnymede in order to quell the open rebellion of a group of feudal barons. Its aim was thus not to grant any rights to the English populace, but merely to reassert the authority of certain members of the nobility. Article 39 whether by the literal meaning of its own terms or a historical analysis, does not guarantee right to trial by jury.

In fact, most historians accept that jury trials of some form or the other occurred long before this point. And it was not in Britain that they first appeared either. The first written description of a

¹³ William A. Forsyth, *History of Trial by Jury* (Jersey City: Frederick D. Lyn & Co,)

procedure similar to trial by jury is attributed to an Athenian statesman named Solon who lived between 638 and 558 BC.¹⁴ The city-state of Athens had a form of trial not unlike the jury where dicasts or male citizens above a certain age were randomly selected to hear charges brought against fellow citizens and paid a nominal sum by the state to do so. Thus, the famous Greek philosopher Socrates, who was charged with corrupting youth and impiety met his end before five hundred fellow citizens, including his student, Plato, who determined not only his guilt but his sentence of execution by consumption of hemlock.

Another precursor to the jury trial was the lafif which was developed between the 8th and 11th centuries by the Maliki school of Islamic Law and which operated in North Africa and Sicily. The lafif was a body of twelve men drawn from the neighborhood who swore to tell the truth and give a unanimous verdict about matters that “...*they had personally seen or heard, binding on the judge to settle the truth concerning facts in a case between ordinary people and obtained as of right by the Plaintiff*”.¹⁵ Professor John Makdisi of St. Thomas University of Law hypothesizes that the lafif may have been introduced into England by the Normans who conquered both England and the Emirate of Sicily as the lafif was the legal institution most closely resembling in character and function the early English jury.¹⁶

The early English jury consisting of twelve individuals originated in the reign of Henry II. It was initially used to settle land disputes and was therefore constituted of persons “*drawn from the neighborhood who were taken to have knowledge of all the relevant facts*” who were required on earth to determine based on their knowledge which of two litigants were entitled to land. When Pope Innocent forbade the participation of clergy in trial by ordeal, which assumed that God would protect the innocent and was then the primary method of trial, a new method of trial had to be found and it was located in the jury or body of twelve “free and lawful” men. The accused was therefore judged by his own neighborhood.

In stark contrast to what occurs nowadays, jurors were initially selected for their prior knowledge of the person or matter being tried; they were not expected to be empanelled without having been contaminated by this information. However, over the following centuries, the role of the jury

¹⁴ Rene Worsmser, *The Law* (Simon & Schuster, 1949) pp 52-58.

¹⁵ John Makdisi, “Islamic Origins of the Common Law”, 7 (1999) *North Carolina Law Review*. 1635-1739.

¹⁶ *Ibid*

evolved, so that by the fifteenth century, the idea of the “self-informing” jury gave way to one that heard the evidence evolving as it was presented at trial. Even then, however, there was no need for them to be neutral in the way that the modern juror has to be and their verdicts could be grounded not only on the information presented before them but on what they knew.

There were other differences as well. A separate panel was not constituted for each trial and, indeed, it is reported that until the 1770s, two 12-man juries used to sit at the Old Bailey for several days and dispose of the entire caseload of 50 to 100 trials for that session.

The Attraction of Trial by a Jury

What appeal does trial by twelve of our fellow countrymen and women have over trial by a judge sitting alone? What makes this form of trial, more than any other a “*bulwark of liberty*”, to quote Lord Devlin? And are these advantages merited or are they exaggerated?

As opposed to a bench trial, i.e. by a judge sitting alone, an accused in a jury trial is judged by ordinary people chosen from amongst society, not by a ruler or leader or his appointed representative. Trial by jury therefore carries great symbolic value, some would perhaps say greater symbolic value than practical significance. Use of this form of trial demonstrates that people are not accountable to the state in the form of an appointed judge, but to their fellow citizens.

As juries are constituted of randomly selected individuals taken from the community generally, who arrive to hear the matter without any vested interest, verdicts given by them may be considered to have been given by the people or the populace. Their verdicts are also considered to be representative of the governing social mores and norms of the society in which they are situated. Additionally, as the jury would not be hardened by repeatedly hearing cases bearing similar facts, they can view the matter with fresh eyes.

The greatest strength of the jury lies, however, in the involvement of ordinary persons. By including them into the judicial process, the legal system is to an extent democratized. Their participation also provides greater transparency and legitimacy to verdicts that are rendered.

Many judges have declared, as former US Supreme Court Justice Byron White did, that a right to jury trial was granted in order to provide ordinary persons with “*an inestimable safeguard*”

against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge”.¹⁷ These words may appear exaggerated but the truth underlying them is evident from the experience of Russia. It is no coincidence that Spain and Russia introduced lay participation in the judicial system after dictatorship and communism respectively were dismantled.

Lord Carswell stated in *R v Smith* (No.2) [2005] UKHL 12 that “*the institution of jury trial, with all its imperfections, is still trusted by the public as a method of determining the guilt of persons charged with criminal offences.*”

In his seminal work on trial by jury in the Caribbean¹⁸, Prof. Ramesh Deosaran cites the notable Caribbean jurist Justice Telford Georges, former Chief Justice of Zimbabwe, who opined that “*since jurors serve only for a short while, they can be expected to bring to their tasks a freshness of outlook which may be lacking in the professional judge constantly exposed to a succession of stories revealing the iniquities of which man is capable.*” Deosaran adds that “*the social mixture within the jury is exactly the quality which makes it superior to the judge in determining the facts in serious offences. The jury is a democratic institution, historically designed to ‘speak for the people’. Being democratic, community representatives is as important as its legal efficiency.*”

Criticisms

Much of the criticism directed at this mode of trial can be captured in the following quote attributed to Oppenheimer who pointed out that in trying a person using a jury:

We commonly strive to assemble 12 persons colossally ignorant of all practical matters, fill their vacuous heads with law they cannot comprehend, obfuscate their seldom intellects with testimony which they are incompetent to analyze or unable to remember, permit partisan lawyers to bewilder them with their meaningless sophistry, then lock them up until the most obstinate of their number coerce the others into submission or drive them into open revolt.

No less a judicial personage than Sir Burton Hall, former Chief Justice of The Bahamas and now judge at the UN International Criminal Tribunal for Yugoslavia, has been highly critical of trial by jury, urging for its removal. He has urged that not only is trying cases in this manner

¹⁷ *Duncan v. Louisiana*, 391 US 145, 155 (1968) per Justice Byron White.

¹⁸ Trial by Jury: Social and Psychological Dynamics, at p. 259

inefficient “*both in terms of time and in terms of money*” but, he contends, it is not right that the most serious criminal charges are being determined by a body which was not required to give any reasons for its decisions.¹⁹

There is also an economic cost to trial by jury, although the precise amount of this cost remains unquantified in our jurisdictions. It has been estimated that the cost of trial by jury in England amounts to £6 million as opposed to the £1.6 million assigned to trials without a jury.²⁰ This cost, it is alleged, is more than thrice that of the cost of having a non-jury trial. Scrapping the jury, it has been argued, will save the government more than £120 million a year.²¹ The cost does not only include the money expended by the state to hold the trial, but the personal economic cost suffered by jurors hearing matters, particularly where those jurors are self-employed. The compensation offered by the state for jury duty does not come close to matching the actual economic loss suffered by the individual juror..

The inefficiency of the system is evident, critics say, from the number of mistrials that can occur. Just two months ago, Guyanese newspapers reported that a jury which had been empanelled at the Demerara High Court to determine whether an accused person was unfit to stand trial found the accused fit to do so in clear contradiction of the report of an expert witness who as a duly qualified and experienced psychiatrist had examined the accused and concluded that in his medical opinion he was suffering from paranoid schizophrenia and could neither understand the charge against him nor give instructions to an attorney.²² The accused has now been remanded to await trial by another jury who are expected to return a verdict in line with the psychiatric findings.

This issue has occurred closer to home for me. About three months ago, one of the Justices in my Court, Justice Maureen Crane-Scott, called me on the phone, obviously infuriated. She

¹⁹ “AG wants to abolish jury trials in certain cases” *Nassau Guardian* June 11, 2013. Available at: http://www.bahamaslocal.com/newsitem/75017/AG_wants_to_abolish_jury_trials_in_certain_cases.html

²⁰ Henry Porter and Afua Hirsch, “Trial by Jury is the basis of British Justice” *The Guardian* April 10, 2010. Available at: <http://www.guardian.co.uk/commentisfree/henryporter/2010/apr/01/trial-by-jury-heathrow-case>

²¹ Thom Brooks, “Defence of the jury is an open and shut case” *Times Higher Education* March 2, 2007. Available at: <http://www.timeshighereducation.co.uk/208058.article>

²² George Barclay, “Jurors give verdict in contradiction of psychiatrists’ findings” *Guyana Chronicle* March 28, 2013. Available at: http://guyanachronicle.com/site/index.php?option=com_content&view=article&id=57182:jurors-gave-verdict-in-contradiction-of-psychiatrists-findings-murder-accused-remanded-to-await-trial-by-another-jury&catid=2:news&Itemid=3

reported to me that she had just declared a mistrial. It was the cause of the mistrial that infuriated me as well because, after five weeks of a murder trial, the judge had begun to hear some twitter about potential juror misconduct. When she investigated, it was discovered that one of the witnesses was the father-in-law of one of the jurors. What was interesting is that the judges in the Continuous Criminal Sessions, which replaced the Assizes, have developed the habit of having read out loud to the jurors the names of all the witnesses slated to be called to testify. The offending juror sat stolidly mute while his wife's father's name was called as a witness.

Jury service may also, depending on the length and nature of the trial in question and the personality of the juror involved, may also be a very stressful experience with lingering consequences. Jurors who had deliberated on trials where detailed descriptions of gruesome crimes were given have reported suffering from anxiety and nightmares simply because of what had been seen and heard.²³

In correspondence between himself and Sir Frederick Pollock, the renowned American jurist Oliver Wendell Holmes wrote:

The man who wants a jury has a bad case - as an old Australian Judge said to me last year. I think there is a growing disbelief in the jury as an instrument for the discovery of truth. The use of it is to let a little popular prejudice into the administration of the law - (in violation of their oath).²⁴

The words of Justice Holmes discloses another criticism of the jury trial (one not always viewed as a criticism) which is that grounded as it is on an adversarial system of justice, it favors the rights of the accused and does not facilitate the discovery of what may actually have happened. Indeed, in proposing the abolition of jury trial, one British MP asserted that it was intended to

²³ Daniel Goleman "For many jurors trial begins after the verdict" *The New York Times* May 14, 1991. Available at: <http://www.nytimes.com/1991/05/14/science/for-many-jurors-trials-begin-after-the-verdict.html>. See also Murray Wardrop, "Jurors suffer trauma in gruesome cases, scientists warn" *The Telegraph* March 19, 2009. Available at: <http://www.telegraph.co.uk/news/uknews/5013391/Jurors-suffer-trauma-in-gruesome-cases-scientists-warn.html>

²⁴ Mark De Wolfe-Howe (ed.), *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932 (Massachusetts: Harvard University Press, 1941)* Available at: <http://www.commonlaw.com/HP.html>

modernize the justice system to rebalance in favor of victims and witnesses while still protecting the rights of the defendants.²⁵

Trial by Google and Twitter: Twentieth Century Challenges to Jury Trials

In the inaugural Distinguished Jurist Lecture delivered two years ago, Sir Shridath Ramphal quite aptly called this period of our history "*an age of rapid and often bewildering transition*". Each day we encounter seemingly endless technological inventions and improvements aimed at making our lives just a bit more easier, information and ideas just a bit more accessible, communication just a little bit more convenient. The rapid rate at which technology has evolved has catalyzed a corresponding continuous evolution in societal norms and behavior. Ultimately, the world as we know it today is very different from the world as it was when Magna Carta was signed, for the world in which trial by jury was created to serve was

"...a world lit only by fire. Books were rarer than unicorns and the average person was [uneducated and] lived and died within a few miles of his birthplace without ever having learnt anything of the world outside."²⁶

Our world is now alight not only with electricity, but primary education, which has become universal in this region, and secondary and tertiary education extensive to varying degrees. Media in the form of newspapers, magazines, televisions and radios have pervaded almost every home (*Today, even the poorest of the poor...have access...²⁷*) and has, by adopting the form of a smart phone, burrowed into our pockets and purses. Just before I came on to the stage to speak to you this evening, I received news updates of the political situation in Egypt where there has just been a popular coup. I can with my mobile phone access online the judgments of the Eastern Caribbean Supreme Court. And if I need any advice, my colleagues in New York and South Africa are but an email, a BB message or a Whatsapp! message away, all of which I can send and receive utilizing my Blackberry Torch or, in the case of emails, using my Samsung Galaxy tablet from which I am presently reading.

²⁵ "Straw presses on with jury plans" *BBC News* January 21, 2000. Available at: http://news.bbc.co.uk/2/hi/uk_news/politics/612716.stm

²⁶ "A Jury of One" by Feisal Naqvi, *3Quarks Daily* November 22, 2010. Available at: <http://www.3quarksdaily.com/3quarksdaily/2010/11/a-.html>

²⁷ *Ibid.*

The tentacles of technology threaten to transform what we regard as trial by jury into “trial by Google”, a term I respectfully borrow from a speech given by the English Attorney-General, the Rt Hon Dominic Grieve, QC, MP, in a lecture delivered at the University of Kent earlier this year.²⁸ Trial by Google or twitter or tumblr or facebook or Wikipedia, to say nothing of Youtube, encapsulates the influence that the internet may have on jurors who either inadvertently encounter material or deliberately attempt to research the case on which they sit. It has the potential to become a serious problem that challenges our conception of a fair trial. The dangers which our criminal justice systems are likely to face have already been scented, albeit in other jurisdictions.

The *Queen v Barry Medlock*, was one of many criminal trials that took place in England just two years ago in 2011. It was one of few criminal trials that occurred by jury that year.²⁹ Yet Medlock is a trial that distinguishes itself. And it does so for all the wrong reasons.

Medlock was charged, along with two co-defendants, with causing grievous bodily harm. One of the jurors in his trial at the Luton County Court was a former university lecturer in Psychology, 34 year old Theodora Dallas. Perhaps because she was intent on taking her civic duty seriously or perhaps because she was simply distracted when the judge gave his directions, Ms. Dallas, despite repeated warnings from the Court, decided to research certain terms she heard being used on her own. In the comfort of her home, she called up the modern day wise man to which we all turn – Google – and typed in “*grievous bodily harm*”. Had she restrained herself to searching that term alone, her fate may have been different. But, alas, she did not. To this search term, she added another – *Luton* – the name of the area in which the trial was occurring. The combined terms brought up a newspaper article in which it was revealed that Barry Medlock, the defendant the allegation against whom she was to judge, had been previously charged with rape, but had been acquitted of this charge. This was information that had no bearing on the trial and was rightly not disclosed. This is information that we are all aware may be prejudicial to the accused. Those of us in the business of conducting trials as judges or advocates know of this by the

²⁸ See Dominic Grieve, QC, *Trial by Google? Juries, social media and the internet*. February 6, 2013 Available at: <https://www.gov.uk/government/speeches/trial-by-google-juries-social-media-and-the-internet>

²⁹ See “Supreme Court Rejects Juror Contempt Case” Solicitors Journal, January 30, 2012. Available at: <http://www.solicitorsjournal.com/node/9143> and also “Juror jailed over online research”, Guardian Newspaper, January 23, 2012 Available at: <http://www.guardian.co.uk/law/2012/jan/23/juror-contempt-court-online-research>

sobriquet "similar fact evidence" (or as New Yorkers call it, "evidence of prior bad acts"), most of which is, as a general rule, inadmissible.

It is possible that even armed with this information, no consequence may have been faced by Ms. Dallas for, after all, how would the Court or anyone else become aware of her independent research conducted as it was in the sanctity of her own home. But the information was just too juicy and this university lecturer simply could not keep it to herself. Thus, during the course of deliberations, Ms. Dallas shared her findings with her fellow jurors, one of whom mentioned the internet research to the usher and the usher, in turn, told the Court.

The trial ground to a halt. A mistrial was declared and the jury was discharged. The Attorney-General immediately instituted contempt proceedings against Ms. Dallas. Ms. Dallas apologized; she had not, she claimed, understood that she "*could make no search on the Internet*" and simply "*never thought [her actions] would cause such disruption*". The Court was not satisfied with her explanation or apology. The judge had been careful to warn Ms. Dallas and her fellow jurors, not once but repeatedly, not to use the internet to research anything relating to the case. Her fellow jurors had fully understood their responsibility while a university lecturer had not. The Lord Chief Justice found that she had also understood the instructions but had deliberately disobeyed them and in so doing acted "*directly contrary to her oath as a juror*". In sentencing her, he warned that:

"Misuse of the internet by a juror is always a most serious irregularity and an effective custodial sentence is virtually inevitable."

For her misplaced eagerness, Ms. Dallas was sentenced to six months in prison for contempt. Her application seeking leave to appeal was refused. Because of the extensive publicity that the incident received, she was also suspended from and ultimately resigned her university job. Her story should be taken as a warning to other jurors appearing before the Court and to judges as to what to expect.

Juror misconduct of the type in which Ms. Dallas engaged makes a mockery of the rules of evidence and taints the evidence on which the jury chooses to rely when arriving at a verdict. I wish I could report that what happened in the *Queen v Barry Medlock* was an anomaly. It is not. Instead, it is but one of a number of cases occurring within the last five years where the use of an

internet search engine or social media platform by a juror has either led to the removal of a juror, halted a jury trial in the midst of proceedings or caused a conviction to be set aside.

A case in which a conviction had to be set aside was that of Jamaican Reggae artiste Buju Banton who had been charged with and convicted in the US Federal District Court in Florida of carrying an illegal firearm, as well as a number of drug-related charges. After a juror revealed in a newspaper interview that she had conducted independent research concerning the case relating to the gun charge, Banton's defence attorney appealed his convictions.³⁰ The judge set aside the verdict relating to the gun charge only. The juror conducting the research was also charged with contempt.

In 2010, a jury in the Benton County Circuit Court of Arkansas found Erikson Dimas-Martinez guilty of aggravated burglary and capital murder for the fatal and deliberate shooting of 17 year-old Derrick Jefferson in 2006.³¹ In clear view of two witnesses who had testified in Court, Jefferson had been shot once in the head after being robbed of \$30 and his coat and cap.³² Dimas-Martinez was sentenced to life imprisonment for the aggravated burglary, and to death for the capital murder. He appealed his conviction and alleged on appeal, *inter alia*, that the Court had erred in refusing to dismiss jurors who had disregarded its instructions by sleeping and tweeting during the proceedings, and in failing to declare a mistrial.³³ This error on the part of the Court had, according to counsel for Dimas-Martinez, cost him a fair trial. The Arkansas Court of Appeal agreed and a new trial was granted.³⁴ While their decision cannot be faulted, one can only imagine the emotional turmoil endured by the family of the victim and the

³⁰ See Patty Ryan "Buju Banton gun conviction set aside, juror may face contempt charge" *Tampa Bay Times* June 26, 2013. Available at: <http://www.tampabay.com/news/courts/criminal/judge-tosses-buju-banton-gun-conviction-wants-contempt-charge-against-juror/2128693>

³¹ "Death Penalty Overturned because of sleeping, tweeting jurors" *Crime in the Suites*, Jan 25, 2012. Available at: <http://crimeinthesuites.com/death-penalty-overturned-because-of-sleeping-tweeting-jurors/>

³² "Derrick Johnson (17) was shot to death after two men robbed him of \$30" May 02, 2008. Available at: [http://www.mydeathspace.com/article/2008/05/02/Derrick Jefferson \(17\) was shot to death after two men robbed him of 30](http://www.mydeathspace.com/article/2008/05/02/Derrick%20Jefferson%20(17)%20was%20shot%20to%20death%20after%20two%20men%20robbed%20him%20of%2030)

³³ *Erikson Dimas-Martinez v State of Arkansas*, Opinion of Donald Corbin, Associate Judge, Delivered December 8, 2011. Available at: <http://opinions.aoc.arkansas.gov/WebLink8/0/doc/252414/Electronic.aspx>. See also <http://www.nlrg.com/blogs/jury-research/bid/72541/What-Is-It-About-Don-t-Twitter-You-Do-Not-Understand>

³⁴ Suzi Parker, "Arkansas death row inmate gets new trial because of twitter". Reuters December 8, 2011. Available at: <http://www.reuters.com/article/2011/12/08/us-crime-twitter-arkansas-idUSTRE7B72C220111208>

witnesses to the crime, who had to endure a trial for a second time due to no fault of either themselves or the attorneys involved.

Lest I ignore facebook, which these days cannot simply be ignored, jurors have also misused facebook and twitter to the detriment of the right to a fair trial. In a multi-million pound drug trial that occurred in August, 2010, a British juror not only friended on facebook a defendant with whom she allegedly felt a certain empathy, but proceeded to have online discussions with the defendant about the charge against her.³⁵ The juror's action caused the complex ten-week trial that was on its third attempt and involved multiple charges and multiple defendants and that was nearing its conclusion to be abruptly aborted.³⁶ Both the juror and defendant in question were found guilty of contempt, with the juror being sentenced to eight months in prison. Another facebook user posted details about the trial in which she was acting as juror so as to hold a poll of her friends simply because she was not sure which way to vote during oncoming deliberations.³⁷ Yet another juror, this time in a case in Michigan in 2010, changed her publicly viewable facebook status to "*Gonna be fun to tell the defendant they're guilty P.*"³⁸ And she had done so before the defence even started its case.³⁹ The status caught the eye of the defendant's son and the juror was unsurprisingly not only removed from the jury for disregarding her oath to hear the other side but fined for contempt.⁴⁰

Although such behavior has not yet been reported in our jurisdictions, with the increasing access of our citizens to the internet and the tantalizing services it offers, these cases foreshadow what is soon likely to come. Such behavior by jurors, which is often contrary to the clear and specific instructions of the judge, is worrying. It can only lead to the wastage of governmental resources

³⁵ Victoria Ward "Juror faces jail over Facebook contempt case" *The Telegraph* June 14, 2011. Available at: <http://www.telegraph.co.uk/technology/facebook/8575334/Juror-faces-jail-over-Facebook-contempt-case.html>

³⁶ "Facebook juror jailed for eight months" *The Guardian* June 16, 2011. Available at: <http://www.guardian.co.uk/uk/2011/jun/16/facebook-juror-jailed-for-eight-months>

³⁷

³⁸ Martha Neil "Oops Juror calls Defendant guilty on facebook" *ABA Journal* Available at: http://www.abajournal.com/news/article/oops_juror_calls_defendant_guilty_on_facebook_though_verdict_isnt_in

³⁹ Ed White, "Judge punishes Michigan juror for facebook post" *Seattle Times* September 2, 2010. Available at: http://seattletimes.com/html/nationworld/2012785464_apusfacebookjuror.html

⁴⁰ *Ibid.*

and precious judicial time, while exacerbating systemic delays that already exist. It also seriously threatens the right to a fair trial.

There is another, perhaps less evident, risk posed by technological innovation that does not bode well for jury trials of the future, should they continue in the same manner in which they do today. In part, I suspect, because of technological innovations we have now amongst a large and growing body of citizens with ever shortening attention spans who find it difficult to sit down and listen.

Alternatives to Jury Trials and Emerging Trends

It cannot be disputed that trial by jury in the form practiced by our nations is marred by challenges. Criticisms of the process are not unmerited and cannot and should not be disregarded. The question that must necessarily be asked, however, is what alternatives to this system exist?

To answer that question, we need not look too far. Trial by a group of your peers who, supervised and directed by a judge, decide on issues of fact is not the most common method of determining the guilt of an accused. In South and East Asia, Africa and much of continental Europe jurisdictions it does not exist, at least not as we know it in the Caribbean.

In many of these countries, however, lay participation in the judicial system is guaranteed by having lay assessors or judges. This system originated from the inquisitorial system of trial common to civil law jurisdictions. Indeed, because of the original Spanish colonization of Trinidad, criminal courts initially consisted of two lay assessors and a judge, until the English system of trial was introduced.⁴¹

Deosaran notes that the reasons advanced for the abandonment of trial by jury in some Commonwealth countries, particularly in Africa, have been “bias, personal involvement and corruption of jurors.”⁴² The precise manner by which the system of lay assessors operates varies substantially from jurisdiction to jurisdiction. However, the primary advantage of the system is

⁴¹ Shaheed Hosein, *The History and Contemporary Role of the Jury with particular reference to Trinidad and Tobago* (UWI Law Library, Unpublished Thesis, 1973) p. 5.

⁴² Deosaran, *op. cit.*, at 19.

that it provides the community or lay participation in trials that provides credibility to verdicts imposed for serious offences and yet at the same time minimizes or eliminates some of the disadvantages associated with jury trials. The assessors may be trained and carefully selected. Deosaran notes that “assessors were considered useful especially in newly-independent states which contained a substantial number of expatriate judges whose knowledge of the local culture was considered minimal.” However, he again cites former Chief Justice Justice Telford Georges for the proposition that such assessors were usually experienced in the law, and while the lay assessors could legally outvote the judge on issues of fact, Georges had noted that such conflicts were rare.⁴³

The other advantages are that the assessors are employed and paid for their service. Their decision may carry equal weight to that of the judge/s who sit with them or it may be advisory only. And by using assessors and judges together, the risk of bias that follows from having a single judge is reduced, in addition to which the judge is able to share the burden of decision-making. Justice Georges, defending the system of assessors, pointed out:

“Jury trial may not be the cornerstone of the administration of criminal justice but those principles of shared decision-making and public participation certainly are.”⁴⁴

It is possible that some countries within our region may well move away from jury trials. Jury trial in Turks & Caicos was suspended, together with the country’s constitution, by Great Britain in August, 2009 in order to restore good governance and sound financial management after a commission of inquiry concluded that the country was suffering from systematic corruption.⁴⁵ Elections were held earlier this year and a new government installed, but a proposed Bill, to which the Bar Council strongly objects, is now contemplated which proposes to allow criminal

⁴³ Deosaran, op. cit., at 21

⁴⁴ The Hon. Justice Telford Georges, “Is the jury trial an essential cornerstone of justice?” *Second International Commercial Crime Symposium organized under the auspices of the Commonwealth Secretariat’s Commercial Crime Unit and the ICC-International Maritime Bureau and the Centre for Commercial Law Studies, Queen Mary College, University of London*

⁴⁵ “Britain imposes direct rule on Turks and Caicos isles” *CNN* August 15, 2009. Available at: <http://edition.cnn.com/2009/WORLD/europe/08/15/turk.caicos.uk/>

trials to be conducted by a single judge only.⁴⁶ The introduction of bench trials was recommended by Sir Robin Auld because of the small pool of jurors from which to select a jury.⁴⁷

Additionally, in February of last year, Belize had its first non-jury trial. The case was high-profile in nature involving the attempted murder of respected Belizean Queens Counsel, Rodwell Williams; it was the case of the Crown v Ricky Valencia and Akeem Thurton.⁴⁸ Guyana-born Chief Justice of Belize, Kenneth A. Benjamin, presided over the case in which he was to be the judge of both law and fact.

During the course of the trial, one of the defendants, Ricky Valencia was shot dead.⁴⁹ The other defendant was sentenced on March 29, 2012 to 15 years in prison.⁵⁰ The family of the accused believed that neither the sentence nor trial was not fair because the defendant not only had no jury to judge him properly, but because he was unrepresented.⁵¹

Conclusion

The criminal justice system of the Commonwealth Caribbean operates sluggishly in many parts, constrained by delays at all stages. Many of the problems facing it do not lie and are not caused by with the jury system, but by limited resources, administrative inefficiency and at times also corruption. While it may tempting and politically lucrative to call for its abolition, removal of trial by jury will not act as a panacea that will cure all ills of the judicial system and it is necessary to restrain ourselves from regarding it as such. It must be recalled that a jury trial is not the most common method of determining guilt or innocence; it is only used for a small portion of all cases. After all, the vast majority of criminal cases are heard by magistrates who

⁴⁶ Sara Knight, "Bar Council 'strongly and entirely opposed' to trial without a jury bill", *Turks and Caicos Sun* July 9, 2013. Available at: <http://tcisun.server301.com/index.php?p=story&id=1315>

⁴⁷ Gemma Handy, "Right to jury trial likely to be axed," *Turks and Caicos Weekly News Online* July 9, 2013. Available at: <http://tcweeklynews.com/right-to-jury-trial-likely-to-be-axed-p2014-1.htm>

⁴⁸ "Rodwell Williams alleged shooter will be the first to be tried without a jury" *7News Belize* February 6, 2012 Available at: <http://www.7newsbelize.com/sstory.php?nid=21682>

⁴⁹ "Accused in High Profile Crimes, Ricky Valencia, Murdered", *Channel 5 Belize* February 23, 2012. Available at: <http://edition.channel5belize.com/archives/67366>

⁵⁰ "Sentencing for Man Who Shot Rodwell Williams" *7News Belize* March 30, 2012 Available at: <http://www.7newsbelize.com/sstory.php?nid=22118>

⁵¹ *Ibid*

sit without juries. But even there, the hearing of such cases before magistrates is not always without its own set of problems.

One fact, however, is clear. The jury should not be maintained out of sentimental value or nostalgia or because this is what we are used to or because this is what other countries are doing and so we should do so too. There are countries in the world, such as Holland, which have never had a jury system, and whose justice systems have not collapsed for lack of a jury. But trial by jury should also not be abolished for equally nebulous or sentimental reasons. It should remain only if we, as individual societies in the Caribbean, consider it necessary and worthwhile to have the innocence or guilt of a person charged with serious crimes determined in this manner. To have guilt determined in this manner does not come without certain benefits to the judicial system and the society at large.

There is, however, much to be said for limiting the jury, at least in the present form, in certain jurisdictions where complaints and results show that it quite simply is not working, as in Jamaica, where some statistics on the operation of the jury system in that country have been made available. Ultimately, a sound and lasting decision as to how the delivery of justice can be improved in our countries, and whether the delivery of criminal justice demands the abolition of trial by jury can only be made where more studies and information are first made available. We quite simply need another in-depth sociological and economic study of the type conducted in the 1980s by Prof. Deosaran which would also take into account the impact on the jury system of modern technology, particularly the social media.

Whether or not jury trials are maintained or abolished, given the particular threats to the impartiality of juries attendant in small societies such as our own, it would be advisable for each jurisdiction to permit bench trials in specific circumstances, such as, for example, where it is shown that there is a reasonable and palpable risk of jury tampering or interference.

On a final note, it must never be forgotten that our legal system is man-made; no system we select will be infallible. A choice has to be made by the people of a nation as represented by its Parliament, after consultation with all appropriate parties and civil society at large, as to the most appropriate method for each particular society.

I do thank you all for your attendance and your attention, but, mainly, for your patience.