**Penalising the googling juror? – Reflections on the futility of Part 3 of the Criminal Justice and Courts Bill (2013-14)**

The hotchpotch of measures that comprises the Criminal Justice and Courts Bill is about to reach Report Stage in the House of Lords. The Bill sets out a panoply of new and controversial measures to deal with dangerous offenders, young offenders, drugs-testing in prisons, wilful neglect or ill-treatment by care workers, reforms to criminal proceedings (including the use of cautions), the possession of extreme pornographic images, civil proceedings involving judicial review (B Jaffey & T Hickman http://ukconstitutionallaw.org/2014/02/06/ben-jaffey-and-tom-hickman-loading-the-dice-in-judicial-review-the-criminal-justice-and-courts-bill-2014/), personal injury cases and challenges to planning decisions. The adequacy of this miscellaneous approach to law reform will doubtless come under the fuller scrutiny that it deserves elsewhere. This blog takes as its focus provisions in Part 3 of the Bill which seeks to put on a statutory footing offences connected with private research by jurors. I suggest that resort to the criminal law constitutes a clumsy, impractical and unnecessarily punitive attempt to regulate the extra-curial activities of the modern, online juror. It is incumbent on our lawmakers to explore more imaginative responses to the undoubted problem of jurors’ access to untested, internet materials – responses that might be more obviously premised upon an appreciation of jurors’ dutiful efforts to arrive at just verdicts.

Whilst illicit, private research by jurors long pre-dates the Internet (recall Sidney Lumet’s classic 1957 film *Twelve Angry Men*), the ability of jurors to seek out materials concerning events and personnel at the centre of criminal proceedings is considerably enhanced in the electronic era. A survey by Thomas for the Ministry of Justice in 2010 which at the time was reckoned to have underestimated the extent of online research, it was revealed that 12% of jurors in ‘high profile’ and 5% of jurors in standard (non-high profile) cases *confessed* to doing private research into the cases they were trying. (C Thomas, ‘Avoiding the Perfect Storm of Juror Contempt’ [2013] *Crim L Rev* 483) Despite some well- publicised convictions of jurors in 2011 and 2012 for online research during deliberations (*Fraill* [2011] EWHC 1629 and *Dallas* [2012] EWHC 156) resulting in custodial sentences, it would be surprising in 2014 if actual instances of jurors’ private research had not increased beyond the levels reported in 2010.

The legal basis of convictions such as those in *Fraill* and *Dallas* remains unclear. Is the offence committed merely when the juror intentionally disobeys a judicial instruction or does it also need to be shown that he/she has acted in a way calculated to create a real risk of prejudice to the administration of justice? Dallas is currently awaiting the outcome of her application to Strasbourg, arguing that the trial judge’s warning to jurors not to conduct private research lacked the requisite degree of clarity needed to make clear both what was prohibited and what the legal consequences of any breach might be.

It is against this somewhat uncertain background that the Law Commission recommended in 2013 the creation of statutory offences of new offences concerning private research by jurors (and its dissemination) as well as giving trial judges the power to order jury members to surrender electronic communications devices for a limited period. http://lawcommission.justice.gov.uk/docs/lc340\_contempt\_of\_court\_juror\_misconduct.pdf). To be fair to the Commission, it is intended that these new offences operate alongside non-penal measures such as declarations of good behaviour and an amended oath that will reinforce the importance of trying the case solely upon the evidence presented by the parties.

Research in the US where the ‘google mistrial’ in both criminal and civil jury trials is a recognised phenomenon indicates two main reasons why jurors engage in prohibited online searches. (G Lacy, ‘Untangling the Web: How Courts should respond to Juries using the Internet for Research’ (2012) 1 *Reynolds Court and Media Law Journal*  169; D Aaronson & S Patterson, ‘Modernizing Jury Instructions in the Age of Social Media’ (2013) 27 *Crim Just* 4) The first is that some jurors do not understand what forms of conduct are prohibited. They fail thus to see that private inquiry into the meaning of legal/medical terms (such as negligence’ or ‘Van der Woude syndrome’) constitutes ‘research’. In other cases, a warning not to do private research is couched in general, technologically non- specific terms that is misconstrued. These sorts of misunderstanding are or ought to be fairly easily remedied through clearer instructions from the bench. The second reason behind juror online searches is altogether more troublesome however. Even in the face of unambiguous instructions which helpfully make explicit the rationale for restrictions, some jurors refuse to comply, believing that the lawyers are trying to conceal something that is relevant to the proceedings. (T Hoffmeister, ‘Google, Gadgets and Guilt: Juror Misconduct in the Digital Age’ (2012) 83 *U Colo L Rev* 409) Other empirical research from the Australian state of Victoria refers to a phenomenon of ‘juror reactance’ in which, notwithstanding a judicial direction to the contrary, jurors are unable to discard ‘information’ that is considered relevant to the case before them. (J Johnston et al, *Juries & Social Media - A Report prepared for the Victorian Department of Justice* (2013) available at http://epublications.bond.edu.au/law\_pubs/600/) On this basis, it may be predicted the proposed new criminal restrictions in England and Wales will make jurors more likely to conceal the fact of their illicit research from fellow jurors. It is unlikely to stop the research in the first place. What if, in any given criminal trial, there are four or five jurors who have separately conducted private research and conceal this fact from their co-jurors?

**Conclusion**

‘Indeed, the internet has made the commission of many criminal offences much easier. It would be absurd to suggest that such conduct should no longer be criminalised on account of the ease with which such offences can now be committed.’– Rt Hon Attorney General Dominic Grieve QC MP (February 2013) https://www.gov.uk/government/speeches/trial-by-google-juries-social-media-and-the-internet

The insistence of the previous Attorney General on using the full force of the criminal law against googling jurors is understandable even laudable (costs of retrials, ordeals for witnesses and delayed justice are not insignificant reasons for taking a serious view of this conduct) but, for reasons advanced above, likely to fail in its primary objective of halting the practice. The empirically documented phenomena of ‘juror ‘reactance’, linked concerns that the adversarial process is keeping relevant material from jurors and an overriding desire to do justice to all parties will continue to prompt a certain (possibly rising) proportion of jurors to engage in online research. The supporters of the new measures have yet to explain satisfactorily how illicit internet use will be policed and detected. If, as seems likely, few cases of online research will be detected, it would be interesting to hear from the Bill’s supporters precisely how the law will (i) bolster the fairness of criminal proceedings and (ii) will not fall into general disrepute. (Interestingly, in the US there are few instances of criminal proceedings against jurors who engage in private research, D Bell, ‘Juror Misconduct and the Internet’ (2010) 38 *Am J. Crim. L.* 81)

It may be that part of the problem will take of itself in the aftermath of the European Court of Justice’s ruling this May in *Google Spain v Gonzalez (and another*). G*oogle Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* http://curia.europa.eu/juris/liste.jsf?num=C-131/12 Well-counselled defendants may now instruct *Google* to remove links to webpages that mention them. In this way, ‘googling’ will yield up little of any prejudicial effect. But this incidental form of protection for adversarial justice can hardly be said to offer a coherent way forward. At bottom, the way in which our legal system signals its appreciation of jurors’ sincere efforts to arrive at justice may not be best served by a punitive response to ‘fact-gathering’. A more imaginative response to realities of jurors’ online research may be to explore within certain defined limits ways of accommodating jurors’ desire to be more informed about the case before them. At present, the practice of allowing jurors’ questions varies from Crown Court to Crown Court.

Whisper it quietly for fear of upsetting the legal profession’s control over adversarial proceedings - a better response to the problem of the googling juror may necessitate affording ordinary citizens a more active role in establishing the truth of the kind their 18th century predecessors enjoyed.