

## OPINION

# The Wisdom of Juries?

*Morag Goodwin*

Trial by twelve good men and true holds a special place in the affections of most Brits; indeed, there are few elements of our constitutional system to which we are so romantically attached as jury trial. We are brought up on Henry Fonda in *12 Angry Men*, by Harper Lee's *To Kill a Mockingbird*,<sup>1</sup> and the innumerable TV courtroom dramas in which 'ordinary but honest' individuals work together to see justice served. The right to be tried by one's peers is a central element both of our conception of freedom and of our understanding of the relationship of the citizen to the state. And despite snobby assumptions about the populist underpinnings of trial by jury held by many continental jurists – who watched the O.J. Simpson trial with undisguised disgust – there remains a lot to be said for the notion that one's life, liberty and property cannot be declared forfeit by authority without the consent of a cross-section of society as represented by twelve ordinary citizens.

That faith in the jury system appeared to suffer a serious blow earlier this year in the trial of Vicky Pryce. Pryce, a high-flying economist and former joint head of the UK Government Economic Service, went on trial in February for conspiracy to pervert the course of justice. She stood trial alongside her ex-husband – the former Cabinet Minister, Chris Huhne – for falsely accepting speeding points on her driver's license for her then-husband and then lying about it to police officers, who were investigating allegations of the fraud that Pryce herself had leaked to the press as pay-back for her husband's infidelity. This case had it all: there was hubris, revenge, Cabinet resignation and political fall-out, lies, infidelity, marriage breakdown, a mistress, filial hatred, and claims of marital coercion. It was a drama of Greek proportions that was almost painful to watch but impossible to look away from. And to top it all off, there was the jury.

After 15 hours of deliberation, the jurors contacted the judge with a list of ten questions for clarification that Mr Justice Sweeney called unprecedented in demonstrating their 'absolutely fundamental deficits in understanding' of their role and the trial process. The questions, which have been widely reported in the UK media,<sup>2</sup> included a request for help in interpreting the phrase 'reasonable doubt.' More worrying for those who put faith in the reason of their fellow citizens were the questions that related to the interpretation of evidence and the relationship between that evidence and guilt. One of the questions the jurors posed concerned what verdict they should return in a situation in which the defendant was guilty

1 Both, admittedly, American.

2 See, for example, BBC News, 'Ten questions posed by Vicky Pryce jury'; <http://www.bbc.co.uk/news/uk-21521460> (last accessed 13 May 2013).

but where the prosecution had not provided enough evidence to be certain beyond a reasonable doubt; the jury seemed not to understand that there can be no question of guilt in the absence of evidence of it. Another question sought guidance on whether they could come to a verdict based on a reason that was not presented in court and which had no facts or evidence to support it – a question seemingly from the ‘she just looks guilty to me, Your Honour’ school of justice. Further questions also suggested a lack of familiarity with the notion that the burden rests upon the prosecution to prove guilt, with one question asking directly whether the defendant was under an obligation to present a defence.

Unable to reach a verdict, perhaps unsurprisingly given their apparent confusion about basic principles of the judicial system, the jury was thanked for their service and dismissed. Pryce was convicted in a re-trial and sentenced to eight months in prison; she has since been released on license after serving two months of her sentence. But has her trial done much longer-term damage to the jury system? Did the Pryce jury not simply perform in a manner long assumed by jurists of the continental tradition?<sup>3</sup>

The ignorance shown by the jurors about the necessary relationship between evidence and guilt is undoubtedly alarming. And they – whoever they were – have been roundly mocked and condemned across the media in a virtual version of the village stocks. Yet it seems, at least for now, that little damage has been done to our collective belief in the jury trial.<sup>4</sup> This comes as a relief: successive UK governments have been keen to scale back the right to jury trial, ostensibly on cost grounds but based also on an instinctive dislike of an institution that stubbornly refuses to bend to governmental will, such as the dictates of a law and order agenda.<sup>5</sup> The Pryce jury might have provided a good excuse to further such ‘reforms.’

But should we not just bow to the seemingly inevitable and hand over the administration of justice to professionals? What is worth keeping about a system in which jurors fail to understand the most basic idea that guilt is determined by the evidence? Jury trials also stand accused of infecting the administration of justice with prejudice, against racial and ethnic minorities and against women. It is a widely perceived truth that juries fail to convict defendants accused of rape, for example.

A not particularly well-known 2010 report written by Professor Cheryl Thomas (UCL) and published by the UK Ministry of Justice entitled ‘Are juries fair?’ has,

3 I am often surprised by the vehemence of feeling against jury trials amongst Dutch lawyers, who seem to see it as a relic from a barbaric era (which, of course, historically it is). See Sadakat Kadri, *The Trial. A History from Socrates to O.J. Simpson* (London: Harper Perennial, 2006).

4 As judged by the speed at which the story disappeared from the headlines and the lack of calls for reform that followed in the trial’s wake.

5 Conviction rates for serious crimes have remained a steady 55% for decades. *Infra*, note 6.

however, tested some of these myths.<sup>6</sup> The report – based upon a study of 68,000 trials looking at jury composition, their verdicts, including interviews with the jurors – concluded that there was no evidence to suggest that juries were unfair. Not only did the evidence suggest that white jurors did not discriminate against defendants of other ethnic backgrounds but all-white juries and mixed-race juries have similar conviction rates and patterns. It seems that standing before a jury is one of the few places within the criminal justice system in which citizens belonging to an ethnic or racial minority can have confidence in equal treatment. Moreover, there is no evidence to suggest that juries discriminate against women; while the conviction rate for defendants charged with rape is shockingly low at 6%,<sup>7</sup> juries appear to convict at the same rate as for other serious crimes. The failures occur elsewhere, earlier, within the process.

But evidence that juries do not discriminate does not address concerns about the emotional and unpredictable way in which juries deliberate. The findings of the Thomas report suggest that Vicky Pryce's jurors were not complete outliers in failing to understand some of the basic principles of the justice system. And yet, those jurors did not fail to understand what justice required of them: they were willing to acknowledge their confusion and to express that uncertainty by failing to reach a verdict.

What their questions reveal are ordinary people wrestling with subjects that are not quite so ridiculous: do we really know how much doubt is reasonable, for example? In expressing their uncertainty, they brought a certain humility to the process of justice. There is something rather humane in the idea that questions of guilt and innocence are ultimately unknowable; that justice is not simply a matter of intelligent, trained individuals applying reason to a set of facts like a puzzle to be solved. Professionals are arguably much less likely to be so willing or able to express uncertainty in the face of the ultimately unknowable, and are likely thus to feel more secure in their ability to sit in judgement over another. The jurors' doubts may have reflected a lack of education, but they also gave voice to the importance of recognising the uncertainty inherent in judging guilt.

The questions and the inability to reach a verdict also speak to the importance the jurors gave to the occasion. The jurors judging Vicky Pryce took their role seriously and, in an era in which it is common to complain of the disengagement of citizens from the political process, they engaged wholeheartedly with the serious

6 Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice, February 2010), <http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>.

7 It is shockingly low because of the requirement upon the Crown Prosecution Service to only prosecute a defendant where there is a 'realistic prospect of conviction.' The 6% refers to the conviction rate for *all* rape complaints not those that have been judged to have a realistic prospect of conviction and thus actually proceed to court. For more on the decision to prosecute, see [http://www.cps.gov.uk/victims\\_witnesses/resources/prosecution.html#a05](http://www.cps.gov.uk/victims_witnesses/resources/prosecution.html#a05). The latest figures on the conviction rate for complaints that make it to trial show a rise to 63%; 'Rape conviction rate at an all-time high', *The Guardian*, 23 April 2013; <http://www.guardian.co.uk/society/2013/apr/23/rape-conviction-rate-high>.

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question of a fellow citizen's guilt and possible loss of liberty. They were willing to make fools of themselves rather than fail to fulfil the task assigned to them. Seen in such a light, the jury's questions begin to seem a little courageous.

Juries stand accused of creating uncertainty in the administration of justice by their unpredictable behaviour. Yet our glimpse into the deliberations of the Pryce jury allows us to see that that uncertainty is not created but reflected by the jury: that uncertainty is inherent to the determination of guilt. By forcing us to acknowledge it, it reinforces the humanity of the individual on trial. Uncertainty thus becomes part of the virtue of jury trials; the consistency of bench trials part of their vice. Instead of representing a formidable challenge to the wisdom of the jury system, the Vicky Pryce jury thus demonstrated much that is good about it.