Can juries still deliver justice in high-profile cases in the age of social media?

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The recent sudden end to the Bruce Lehrmann trial last month raises again whether the jury is fit for purpose in a 21st century hyper-connected world.

That jury's service in the Lehrmann case ended peremptorily after it was revealed to the judge that material downloaded from the internet (which was highly relevant to the case and not introduced as evidence) had been found in the jury room. A retrial has been set for late February. Lehrmann had been accused of raping former Liberal Party staffer Brittany Higgins, to which he pleaded not guilty.

The costs so far (to both parties and the court) could well exceed a million dollars.

With easy access to the internet available to any juror who owns a mobile phone, is it conceivable that all jurors will abide by the strict instructions of a judge admonishing them to pay attention only to the evidence adduced in the trial?

Are instructions to jurors to avoid media sources meaningless given the accessibility of the internet?

These aren't new questions. In 2005, a report prepared for the NSW Parliamentary Library Research Service observed:

"Prominent cases in recent years […] have illustrated the legal problems that can occur when jurors, despite judicial instructions to confine their deliberations to the evidence before them, undertake their own research, discuss the case with non-jurors, or visit a place connected with the offense. The increasing amount of legal information available on the internet is a cause for particular concern. The Jury Amendment Act 2004 […] prohibits jurors from making inquiries about the accused or issues in the trial, except in the proper exercise of juror functions."

But for all the warnings and threats of consequences, a juror may still stray down the path of private sleuth. It's easy to do and Australians have a voracious appetite for social media. In 2018 a survey reported 62% of Australian adults use social media sites every day, and 34% use them more than five times a day.

This becomes particularly problematic when the eyes of the world are fixed on cases such as these.

The sudden and unexpected end to the Lehrmann trial prompts a more fundamental question: should we continue to persist with juries at all?

Two sides

There are two sides to the argument regarding retention of the jury.

On the one hand, juries have stood the test of time. The idea of being tried by one's peers was entrenched by the Magna Carta of 1215. Even though the jury as we know it didn't crystallize until about 350 years ago and has been through a number of permutations since then, there would be few people who could argue against its symbolic legitimacy given its staying power.

Over that time, juries have been given sustained examination in Australia by the New South Wales Law Reform Commission, the Queensland Criminal Justice Commission, the Victorian Law Reform Committee, and most recently by academics at Charles Sturt University, to name a few. Juries have survived largely intact throughout this exercise.

On the other hand, there are doubts about their efficiency. Juries took a hit after the High Court decision in the George Pell appeal where the judges, in allowing the appeal, ruled that no jury, properly instructed,

could have reached a guilty verdict in his trial.

What's more, it's overstated to say that trial by jury is a fundamental bulwark of fairness in the criminal justice system. Indeed, 92% of criminal matters in Australia are dealt with in the magistrates courts, where there are no juries. Of the remaining 8% referred to the "superior" criminal courts (Supreme, District and County), more and more defendants are choosing "judge alone" trials (in jurisdictions where that option is available). For example, in NSW, up to a quarter of accused persons are now electing to be tried without a jury.

Other studies have highlighted how jurors overrate DNA evidence despite judicial directions, which may lead to far more jury convictions than are warranted, and how jurors' perceptions of guilt and innocence can be affected by the positioning of defendants in the courtroom. Another study found that although jurors report they understand directions, they often don't appear to use those directions in arriving at a decision.

And finally, as the Lehrmann trial has illustrated, it's not unusual for jurors to ignore or misunderstand the instructions that have been given to them.

But, what about the ability of juries to apply some of their own "commonsense" justice? True, there are examples of juries wielding their own commonsense stick. For example, a verdict that occurred in 1981 when a South Australian jury returned a verdict of not guilty for a woman who had been charged with the murder of her husband. The jury decided that the defense of provocation (only available to reduce murder to manslaughter) exonerated her, figuring that, in the time before the victim's death, his severe and persistent abuse of his family had pushed his wife to breaking point.

There is, however, a contrary argument. Research has revealed that "commonsense" comes with coded biases, such that telling jurors to use their commonsense is futile, given it's difficult (if not impossible) to erode such biases.

Are there other options?

One alternative to the jury is mixed judiciaries used in some European countries, where one may find a panel of judges or a combination of judges and lay people. But the common law world has never looked like following that lead.

Another alternative in use in Australia is a judge alone trial, although that option isn't always available, and by virtue of Section 80 of the Constitution isn't available in a trial of a serious federal offense. Indeed, there's no guarantee that judges themselves are immune from social media influences. While there's a widespread belief that judges are more capable than juries of putting to one side their own prejudices, the rules regarding sub judice contempt (discussing publicly a matter that is before a court in a manner that may influence the outcome) applies equally to judge alone and jury trials.

Adding to the policy confusion, there's some evidence trials by judge alone do make a difference to the outcome. The NSW Bureau of Crime Statistics examined NSW trials between 1993 and 2011 and found defendants were acquitted 55.4% of the time in a judge alone trial, compared to 29% in a jury trial.

Another reform idea is to allow jurors to raise questions with the judge during breaks in the trial, including asking about things they may have "accidentally" come across on social media. A judge could send the jury out while the lawyers present to the judge how they think the questions should be handled and answered. However, this idea has yet to excite

policymakers.

In the end, we must accept there are flaws in jury process. But finding acceptable alternatives has proved difficult, hence the reluctance of governments to abandon the status quo. Judges will continue to warn against private sleuthing, but one suspects that it will, from time to time, continue regardless.

One can only hope the disaster that befell the Lehrmann trial sends a salutary lesson to prospective jurors henceforth: listen to what the judge tells you, and during the course of the trial leave your favorite search engine alone.

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