Decision Processes in the Jury Room

A. PHILIP SEALY

Introduction

The Anglo-American adversary process in the criminal justice system and, to a lesser extent in the civil justice system, is marked by a clear distinction, in theory, between matters of fact and matters of law, decisions in the former case being for the lay-person, the “fact-finder”, and in the latter, for the judge. As Devlin (1956) remarks, the judge makes two formal warnings at the outset of the trial addressed to members of the jury:

1. “The facts are for you, the law is for me” (Devlin, 1956)
2. “Throughout this trial it is for the Crown to prove its case, not for the defendant to prove his innocence” (Glanville Williams, 1968).

Thus, at the outset of a trial, the rules are defined and the roles prescribed. The rules are set out in the instructions on burden of proof (Cornish, 1969; Cross & Wilkins, 1979; Glanville Williams, 1968). These rules of instruction and exclusion control the evidence admissible in court and attempt to control the interpretations placed on such evidence. The rules can produce fine, perhaps even pedantic, distinctions, such as that quoted by Underwood (1977) where two interpretations of proof were contrasted: proof “beyond reasonable doubt” and proof with “clear and convincing evidence”. These are assumed to be two distinguishable criteria of “proof”. There are many other rules of evidence that constrain and control the evidence reaching the court (LSE Jury Project, 1978). Similarly, the roles of fact-finders and sentencer are explicitly separated: the role of the judge in dealing with the substantive evidence is strictly that of arbiter of admissibility and summarizer of the case as a whole; a sentencing role for the jury is frequently specifically proscribed (e.g. the instruction to try the facts, regardless of potential sentence if guilt is determined). Thus the jury stands at the focal point of contested trials, where facts and law are separated. Hence, then, the importance of attempting to understand the likely processes involved in jury decision-making.
Several problems arise in considering this issue, the first being those associated with the secrecy and anonymity of the jury. Secrecy, amongst other things, means that the jury deliberation cannot be directly observed, or, indeed, reconstructed after the decision. Anonymity implies that neither individually nor collectively may jurors be asked to justify or explain their decision. Although direct observation is impossible because of the constraints surrounding the jury, such observation of jury processes would be difficult to interpret since there are unique and idiosyncratic features to each trial and to each manner of conducting a trial. A second problem arises from the nature of research into trial by jury, namely the choice of critical independent variables. There are two sources of theory for making such a choice of research objectives: the body of knowledge contained in jurisprudence and the varieties of theory found interesting by psychologists. This distinction leads to incompatible choices. For example, of the 72 citations of research on juries — almost all American (Bray & Kerr, 1982) — exactly 50% required the “jurors” to make a judgment on a continuous scale, usually a 7-point one from “1 = definitely guilty” to “7 = definitely innocent”, or the reverse. This is a fairly usual practice in psychological experiments, but is impossible to interpret from a legal point of view where dichotomous decisions are required — guilty or not guilty. Likewise, some researchers (cf. Landy & Aronson, 1969) use the formula “1 = definitely sure of guilty vs. 7 = definitely sure of innocence”. Here two variables are confounded, decision and certainty. It is not difficult to show that these are independent of each other. Rules that have little or no influence on decisions (e.g. majority vs. unanimous instruction) have a statistically significant effect on confidence. Similarly, discussion may not alter jurors’ decisions but have significant effects on their confidence (Sealy, 1978). Again, a number of experiments using jury-like material have manipulated the variable of interpersonal attractiveness (Izzett & Leginsky, 1974; Landy & Aronson, 1969; Ostrom, Werner, & Saks, 1978). Now, in the real world of the courtroom, no one can control “attractiveness”, nor can it be used in the arguments presented, regardless of the putative influence it might have. There is, therefore, a possibility that whilst psychologists pursue their own — legitimate — concerns, they will contribute little to the understanding of the courtroom situation as it exists in reality.

In all of the research quoted here, there has been a vast amount of observed material, whether in the form of completed questionnaires or reviewed audiotapes of discussion. The material — empirical data — has been collected because of the richness of the field, not through the urgency of theory: Darwin did not visit South America because it represented a test-tube for his theory of natural selection. Whilst not elevating the present research beyond its merits, inductive approaches to social research are by no means devoid of validity. Hence, no “theories” led to the selection of what was observed in the cases of research to be quoted in the following pages and, likewise, no “theories” were refuted by observations quoted.

By the same token lawyers use such terms as “mens rea” to denote the well-researched area of the psychology of intentionality, which is diverse and com-