

Book Review: *Juries in the 21st Century*, by Jacqueline Horan

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In *Juries in the 21st Century*,¹ Jacqueline Horan immerses the reader in a discussion of how jury trials operate, how they could be more effective, and how they should adapt to emerging technologies. The book makes three contributions to the existing legal literature. First, it challenges basic assumptions about how juries operate.² Horan demonstrates that not all features of modern jury trials are essential or even useful. She argues convincingly that the existing features of the jury system should only be retained if they contribute positively to the process by which the jury arrives at a verdict. This leads Horan to some interesting conclusions about which features of the modern jury system should be discarded and which could easily be improved upon.

Second, the book reviews the data on jurors' use of social media and the internet.³ She identifies pre-trial publicity and consultation of online material by jurors as major challenges for the courts, and suggests how they might begin to deal with these issues.⁴ Canadian courts have yet to grapple in earnest with the effects of emerging technologies on the trial process,⁵ and Horan's book suggests that such action is overdue. It also provides a useful framework for courts as they begin to confront these challenges.

Finally, the book suggests that the literature on "how [individuals] learn"⁶ holds important lessons for counsel and the courts on how to improve "communication with jurors."⁷ For counsel, this is a strategic consideration: lawyers are keen to

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1 Jacqueline Horan, *Juries in the 21st Century* (Sydney: The Federation Press, 2012).

2 *Ibid.* at chapter one.

3 *Ibid.* at chapters five and six.

4 *Ibid.*

5 Doug Johnston, "Internet is Threat to Fair Jury Trials" *Winnipeg Free Press*, 19 April 2013, online: [Winnipeg Free Press <http://www.winnipegfreepress.com/opinion/analysis/internet-is-threat-to-fair-jury-trials-203733151.html>](http://www.winnipegfreepress.com/opinion/analysis/internet-is-threat-to-fair-jury-trials-203733151.html).

6 Horan refers to "how the contemporary jurors learn": Horan, *supra* note 1 at 52. I will refer to "how individuals learn" throughout.

7 *Ibid.* at 4. I will use the term "communicate with jurors" throughout.

communicate their arguments effectively to the jury.⁸ The courts' concern is for the "integrity"⁹ of the trial process and for ensuring just verdicts.¹⁰ While Horan does not claim novelty in her discussion of this literature, she quite usefully explains why it is important for lawyers and courts to take it seriously.

Horan wrote *Juries in the 21st Century* for "jury practitioners," a group that includes "judges, barristers, instructing solicitors and forensic experts".¹¹ Though the book is aimed at an Australian audience, much of the discussion is also useful to Canadian "jury practitioners". In chapter one Horan reviews the rules of jury selection, explaining that "understanding who's on the jury helps in communicating with the jury."¹² She notes that juries were historically comprised of individuals familiar with the matter.¹³ Now, of course, jurors are required to be unacquainted with the accused and the witnesses, but "[h]istory provides precedent for us to consider how the representative nature of the jury might alter again in order to accommodate contemporary conditions."¹⁴ Horan takes issue with the rules that categorically exclude certain classes of individuals from the jury, such as lawyers, on the grounds that jury representativeness should be maximized.¹⁵ She also notes that excluding individuals who have been convicted of certain offences from jury service disproportionately impacts groups who are over-represented in the justice system, such as Indigenous people.¹⁶ Justice Iacobucci made a similar point in his 2013 report, *First Nations Representation on Ontario Juries*, and recommended that steps be taken to remove this impediment to jury service.¹⁷ Horan also expresses concern about counsel exercising peremptory challenges in a discriminatory fashion, and urges that the legislature eliminate them.¹⁸

In chapters two through four, Horan discusses juror competence. She notes that jurors have long been criticized for their supposed lack of competence,¹⁹ even though the research generally fails to bear out the charge that juries are incapable of dealing with difficult cases or technical evidence.²⁰ At the same time, the trial process could be adapted to further promote juror comprehension.²¹ Horan argues that

⁸ *Ibid.* at 52-53.

⁹ *Ibid.* at 2.

¹⁰ *Ibid.* at 71.

¹¹ *Ibid.* at ix.

¹² *Ibid.* at 10.

¹³ *Ibid.* at 10-11.

¹⁴ *Ibid.* at 15.

¹⁵ *Ibid.* at 17-18.

¹⁶ *Ibid.* at 32-33.

¹⁷ Hon. Frank Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Toronto: Ministry of the Attorney General, 2013) at 91.

¹⁸ Horan, *supra* note 1 at 41.

¹⁹ *Ibid.* at 47-50, 69.

²⁰ *Ibid.* at 49-50, 121-122.

²¹ This is the subject of chapter three of Horan's book.

the trial process should be more responsive to how jurors absorb and process information, and she makes a number of suggestions for improving the system.

Horan states that courts should provide jurors with more information about the trial process and their role in that process.²² Courts should consider using “jury pre-instructions”²³ to head off questions or issues likely to arise during the trial, and provide jurors with definitions of important legal concepts so that they are not tempted to use outside sources to assist them.²⁴ Jurors could be provided with a video recording or transcript of the proceedings and copies of exhibits in electronic form to use during deliberations.²⁵ Judges could also provide jurors with written “decision trees” in addition to the standard charge to help structure these deliberations.²⁶ This is already the practice in some jury cases in Canada.²⁷ Horan provides useful templates for some of these documents.

Turning her attention to counsel, Horan recommends that parties present their legal arguments in multiple formats so that they can be easily understood by different types of learners. Lawyers need to make better use of diagrams and animations in presenting evidence and making submissions.²⁸ Lawyers should also be aware “that jurors are not blank slates when they enter the courtroom”²⁹ and that they tend to filter information through the lens of “their own experience.”³⁰ This means that if lawyers want to keep control of the process, they must provide the jury with a “narrative”³¹ at an early stage of the proceeding, before jurors have had time to construct their own.³² This is not always an appealing proposition for the defence, as Horan points out.³³ Among other things, it would force the defence to disclose its theory of the case to the Crown at an early stage of proceedings. The risks of failing to do so might outweigh the benefits, however.³⁴

Horan then shifts her focus to expert evidence. She explains that counsel have a responsibility to become comfortable with the expert evidence tendered in a case. If they do not understand the evidence themselves, they will not be in a position to make sense of it for the jury.³⁵ Moreover, it is sometimes important for jurors to be told why certain evidence is *not* being presented.³⁶ Jurors may anticipate that cer-

²² *Ibid.* at 76-77, 80.

²³ *Ibid.* at 78 n 30.

²⁴ *Ibid.* at 78, 79.

²⁵ *Ibid.* at 61, 75-76, 83-84.

²⁶ *Ibid.* at 82.

²⁷ Thank you to Leo Russomanno for pointing this out to me.

²⁸ Horan, *supra* note 1 at 54, 74-76, 140-145.

²⁹ *Ibid.* at 56.

³⁰ *Ibid.*

³¹ *Ibid.* at 56. I will use this term throughout.

³² *Ibid.* at 57.

³³ *Ibid.* at 58.

³⁴ *Ibid.*

³⁵ *Ibid.* at 121, 125-126, 135.

³⁶ *Ibid.* at 130-131.

tain kinds of evidence — such as DNA evidence — will form part of the Crown’s case, and may draw an adverse inference when that evidence is missing.³⁷

Horan recommends that counsel and the courts think more innovatively about how expert evidence is adduced.³⁸ The use of animation technology could improve the way that expert evidence is presented, as could standardizing the practice of defining technical terms in expert reports. Horan suggests that Australian courts consider making wider use of court-appointed experts. Courts might also consider asking competing experts to meet before trial to determine where they agree and disagree; allowing experts to testify on a panel; or having competing experts testify one after the other so that jurors hear the expert evidence in sequence.³⁹

Chapters five and six deal with external influences on the jury. Chapter five focuses on jurors who seek out outside information to reach a verdict, while chapter six deals with the problem of pre-trial publicity. The statistics Horan presents paint a distressing picture of jury deliberations tainted by pre-trial publicity and by jurors seeking out outside information on the internet. Data from more than two decades ago suggests that as many as one in ten jury verdicts are tainted by pre-trial publicity.⁴⁰ This problem has likely worsened over time.⁴¹ This has implications for the accused’s fair trial rights,⁴² which are protected in Canada by section 11(d) of the *Canadian Charter of Rights and Freedoms*.⁴³

Jurors seek out outside information, Horan explains, because they are asked to decide cases in a way that differs fundamentally from how they resolve other problems.⁴⁴ The rules of evidence are “unnatural” and out of step with “common sense,” and this compels jurors to seek out additional information to supplement the court record.⁴⁵ Moreover, “intimidating” courtroom dynamics can render jurors reluctant to pose questions, providing further incentive for jurors to seek out information from outside sources.⁴⁶ While other jurisdictions have begun to develop guidelines and policies to deal with these concerns, Canada lags behind.⁴⁷ The Canadian

³⁷ *Ibid.* at 128, 130.

³⁸ *Ibid.* at 131.

³⁹ *Ibid.* at 132–135.

⁴⁰ Horan, *supra* note 1 at 187.

⁴¹ *Ibid.* at 187–188.

⁴² *Ibid.* at 3; Johnston, *supra* note 5.

⁴³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), c 11. Section 11(d) provides that “Any person charged with an offence has the right . . . (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”

⁴⁴ Horan, *supra* note 1 at 150.

⁴⁵ *Ibid.* at 152.

⁴⁶ *Ibid.*

⁴⁷ Johnston, *supra* note 5. For a sampling of these policies and directives, see Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case* (June 2012), online: <www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf>; Jane Johnson *et al.*,

Judicial Council has drafted model “preliminary instructions” and “final instructions” that warn jurors about consulting outside material on the internet, but much work remains to be done.⁴⁸

Horan suggests that judges need to create more space for jurors to ask questions of witnesses.⁴⁹ Judges must also explain to jurors why they may not consult outside sources in reaching a verdict, and come back to this point multiple times throughout the proceeding.⁵⁰ That said, the literature suggests that jurors will look to outside sources to combat perceived deficiencies in the evidence or in the court’s explanation of the law regardless of how comprehensive the jury instructions are or whether this conduct is punishable.⁵¹ Horan suggests that one solution might be for jurors to police each other — that is, for other jurors to disregard outside material if it comes up during deliberations and/or to report rogue jurors to the presiding judge.⁵² Creating an offence of consulting outside materials decreases the likelihood that jurors will report another juror’s misconduct to the court, so this should be discouraged.⁵³ Horan also recommends that counsel try to ensure that material that could prove damaging to their client is taken down from websites.⁵⁴

Horan notes that the internet is making pre-trial publicity more difficult to manage.⁵⁵ A great deal of information is now published by informal means, such as on blogs or social media platforms.⁵⁶ This means that in many circumstances, publication bans are of limited use.⁵⁷ Even remedies targeted specifically at internet publications, such as internet “take-down orders”, can be of limited usefulness if

Juries and Social Media: A Report Prepared for the Victorian Department of Justice (Sydney: The Standing Council on Law and Justice, 2013).

48 The Canadian Judicial Council recommends the following by way of “preliminary instructions”: “Do not use the Internet or any electronic device in connection with this case in any way. This includes chat rooms, Facebook, MySpace, Twitter, Apps, or any other electronic social network. Do not read or post anything about this trial. Do not engage in tweeting or texting about this trial. Do not discuss or read anything about this trial on a blog. Do not discuss this case on e-mail. You must decide the case solely on the evidence you hear in the courtroom”: Canadian Judicial Council, *Model Jury Instructions: Preliminary Instructions* (June 2012), online: Canadian Judicial Council <http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_NCJI-Jury-Instruction-Preliminary-2011-03_en.asp>. Its suggested “final instructions” are substantially similar: Canadian Judicial Council, *Model Jury Instructions: Preliminary Instructions* (June 2012), online: Canadian Judicial Council <http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_NCJI-Jury-Instruction-Final_en.asp#_ftnref2>.

49 Horan, *supra* note 1 at 163.

50 *Ibid.* at 168-169.

51 *Ibid.* at 164-165; 166-167; 168-169.

52 *Ibid.* at 154-155, 165, 166, 166-169.

53 *Ibid.* at 165.

54 *Ibid.* at 172.

55 *Ibid.* at 174.

56 *Ibid.* at 175.

57 *Ibid.* at 179-180.

the scale of the publicity is large.⁵⁸ Jury instructions can again play a role here, but they “[are] highly dependent upon the timing, form and content of their delivery”.⁵⁹ Horan recommends that lawyers follow the coverage of their client’s case and bring an application for a publication ban or take-down order if necessary.⁶⁰ Horan suggests that this “screening” function might also be assumed by an “independent monitoring” body.⁶¹ In notorious cases where the risk of pre-trial publicity is high, the best option may be to proceed with a judge-alone trial.⁶² If trials by judge alone are necessary to ensure a fair trial in certain circumstances, the current rules which require the Crown to consent to trials by judge-alone in the case of certain serious offences may be problematic.⁶³

Overall, the changes Horan proposes are modest. She does suggest that lawyers “who have no connection with the courts should not be disqualified from serving” on juries;⁶⁴ that majority jury verdicts should be considered;⁶⁵ and that peremptory challenges are more harmful than beneficial.⁶⁶ Aside from these more controversial recommendations, however, Horan’s focus is on fine-tuning elements of the jury process.

Horan’s comments about improving juror comprehension through the use of technology are timely. Courtrooms are increasingly equipped with advanced technologies and counsel should consider making better use of them.⁶⁷ At the same time, increasing the technology bar has access to justice implications, and Horan freely acknowledges this.⁶⁸ Equipping the Crown with technological capabilities that are simply unavailable to the defence could impede the accused’s ability to make full answer and defence.⁶⁹ It seems unlikely that provincial legal aid offices will invest heavily in these “bells and whistles” as they struggle to provide even basic funding to accused who are entitled to it. These dynamics are already visible in some Canadian courtrooms.⁷⁰

58 *Ibid.*

59 *Ibid.* at 187.

60 *Ibid.* at 193.

61 *Ibid.*

62 *Ibid.* at 185.

63 See ss. 471, 473, and 568 of the *Criminal Code*, RSC 1985, c C-46. See also Peter Sankoff, “Rewriting the *Canadian Charter of Rights and Freedoms*: Four Suggestions Designed to Promote a Fairer Trial and Evidentiary Process” (2008) 40 SCLR (2d) 349 at 361-62; Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Markham: LexisNexis, 2011) at 467-469, 469 [Penney et al., *Criminal Procedure*].

64 Horan, *supra* note 1 at 16.

65 *Ibid.* For a Canadian view on these issues, see Peter Sankoff, “Majority Jury Verdicts and the Canadian Charter of Rights and Freedoms” (2006) 39 UBCLR 333.

66 Horan, *supra* note 1 at 41-42.

67 *Ibid.* at 139.

68 *Ibid.* at 142, 145-149.

69 *Ibid.* at 146.

70 Thank you to Leo Russomanno and Matthew Webber for pointing this out to me.

Some of Horan's suggestions also run up against the fundamentals of the adversarial system.⁷¹ For example, Horan notes that jurors better understand information when it is presented as a "story" or narrative.⁷² Jurors benefit from being provided with a "framework" or an overview of the "story" that will be told by both sides before witnesses are called. This allows them to contextualize information as they receive it.⁷³ At present, there are strict limits placed on the scope of opening statements in Canada and on whether the defence can make its opening statement at the outset rather than at the close of the Crown's case.⁷⁴ Moreover, as I have noted, defence counsel might be reluctant to disclose their theory of the case at the outset of trial.⁷⁵ Since evidence is called first by the Crown and only later by the defence if it chooses to do so,⁷⁶ it seems unlikely that it would be possible to present evidence in a logical, progressive fashion across witnesses.

Horan's book makes a useful contribution to the legal literature on juries. It suggests many practical changes that could improve juror comprehension. As one of the few books to discuss how technology is changing the jury system, it also highlights both the benefits of technology and the real problems that it is creating for the conduct of trials.

⁷¹ Horan, *supra* at 50-51; 58.

⁷² *Ibid.* at 56-58.

⁷³ *Ibid.*

⁷⁴ *R. v. Paetsch*, 1993 CarswellAlta 892, [1993] A.J. No. 366 (Alta. C.A.); *R. v. D. (A.)*, 2003 CarswellOnt 4149, [2003] O.J. No. 4900 (Ont. S.C.J.). See also Penney et al., *Criminal Procedure*, *supra* note 63 at 680-681: "the defence may seek leave of the court to address the jury immediately following the Crown's opening address, but will have to establish that there are special circumstances that may impair the accused's right to a fair trial if not permitted to do so."

⁷⁵ Horan, *supra* note 1 at 58.

⁷⁶ *A.D.*, *supra* note 74 at para. 17.

