
JURORS
Google

How much should we know?

Senior judges have for good reason long resisted all attempts to undermine the secrecy and anonymity that attaches to juries. Does the internet now threaten this, asks Adam King

The rule prohibiting jurors from conducting internet research on defendants and witnesses is well-established and, particularly after the recent imprisonment of Joanna Fraill and Theodora Dallas, well-known. But is there a similar rule prohibiting barristers from googling jurors? And if there is not, could there be a duty to carry out such research? Anecdotal evidence suggests the practice is not uncommon, although many feel that in the absence of official guidance it is best to proceed with caution.

Observing the jury

Many barristers pay considerable attention to individual jurors throughout the course of a trial. Great care must always be taken not to place undue weight on probabilistic judgements based on limited information, but there are times when an assessment of the character of a particular juror, made with reference to their physical appearance and perhaps also their reaction to certain pieces of evidence, can help an advocate make a better decision about what line to take in a speech. An advocate might even legitimately choose to glance subtly in a particular juror's direction when dealing with a particular point.

To give an example, defendants being tried for serious offences might make admissions about their use of cannabis or other drugs - either as an explanation for guilty behaviour, or in an attempt to give an air of honesty to their evidence in general. How this should be dealt with in a defence speech might be affected by the relative proportions of scruffy nineteen year-olds wearing festival wristbands on the one hand and grey-haired men in gold-buttoned blazers on the other - assuming of course that these generalisations are accurate.

Before the Juries Act 1974 counsel could obtain from the summoning officer the names, addresses and occupations of members of the jury panel (see *R v McCann* (1991) 92 Cr App R 239, at 246). Nowadays counsel ordinarily hear only the jurors' names, shortly before they are sworn. Other than that, appearance, dress, accent and approximate reading ability is all the information available. Unless, that is, barristers do what they have probably already done to their opponents and look them up online.

Not every juror will have an online presence of course, but a fair proportion will. Those with unusual names will of course be easier to find. Data likely to be obtained includes (in estimated order of the ease with which they can be found): current and past employment, education (eg via the website linkedin), marital status, sporting and other hobbies, recent holiday destinations (through facebook, tripadvisor), charity donations (justgiving etc.), political views (through twitter, blog posts/comments), and friendship groups/social class (facebook friend lists). Moreover, it will often be possible to identify from their online information which jurors are most likely to be well-educated and experienced in expressing their opinions, and therefore arguably the ones who will do so most forcefully in the jury retiring room.

Contempt

The Contempt of Court Act 1981 s.8 makes it an offence to "obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations..." Online research of the kind envisaged does not contravene this section, nor is it clearly proscribed by any other legislation.

Despite whatever instinctive reluctance there might be to conduct juror research (it is after all rather American), it could be argued that a barrister is under a duty to use whatever information about jurors is available. Their race, gender and approximate age are obvious, and care is rightly taken not to address them inappropriately in the light of these characteristics. A Google search might prevent a faux-pas in a speech, or even give rise to a challenge for cause, or at least throw up something which ought to be brought to the attention of the judge.

Authorities on "vetting" the panel...

In the particular context of vetting the jury panel with a view to exercising the Crown's right to "stand by", successive guidelines issued by the Attorney-General and approved by the Court of Appeal severely restrict the prosecution's right to obtain information about jurors. The most recent were re-issued in November 2012, and are only very slightly different from the

previous version, issued in 1989 (Juries: Right to Stand By: Jury Checks 88 Cr. App. R. 123.)

In brief summary the guidelines say that jury checks that go beyond a simple check for previous convictions should only be made in "certain exceptional types of case of public importance" - i.e. terrorist cases, or where sensitive evidence will be heard in camera, and that such further investigation should be limited to checks with the police and security services.

Much stronger disapproval of the practice of obtaining information about jurors was previously expressed (obiter) in *R v Sheffield Crown Court (ex parte Brownlow)* (1980) 71 Cr. App. R. 19. Lord Denning stated (at p25) "*To my mind it is unconstitutional for the police authorities to engage in 'jury vetting.' So long as a person is eligible for jury service, and is not disqualified, I cannot think it right that, behind his back, the police should go through his record so as to enable him to be asked to 'stand by for the Crown', or to be challenged by the defence. If this sort of thing is to be allowed, what comes of a man's right to privacy? ...who knows, it may become known to his neighbours and those about him?"* And Lord Justice Shaw agreed: (p29) "*...it is necessary to ensure that those called to discharge the important duty of sitting on a jury in a criminal trial are left to give a true verdict according to the evidence, free from any apprehension or disquiet as to the disclosure of some matter which may be discreditable or embarrassing to them. Apart from the exceptional cases I have indicated, jurors must not be exposed to prodding or probing if they are to discharge their function fearlessly and impartially.*"

...should not prevent barristers researching jurors

But none of this can be taken to outlaw barristers googling jurors with a view to giving better-targeted speeches: the Attorney-General's guidelines, by contrast, have to do with the Crown's power to prevent a juror from sitting at all; and not only were the opinions in *Brownlow* very much obiter (and indeed subsequently disapproved - in *McCann*, above, and *R v Mason* [1981] Q.B. 881), but their Lordships seem to have been concerned only with the possibility that a juror might be distracted by his fear of personal information being disclosed and becoming "known to his neighbours and those about him", which is an outcome that could fairly easily be prevented.

We cannot know what their Lordships would have said on the subject had they been on the bench in the age of the internet, but we do have this from Beldam LJ in *McCann* (above) in 1990: "*As we pointed out in the course of argument, the information given by the summoning officer to the Chief Constable in the present case could have been obtained by laborious research of the electoral register.*" The fact that the information was publicly available is put forward here in support of the proposition that no special status should be afforded to it. Why should the position be different today merely because a search of the electoral register, or other database, is less laborious than it used to be?

A juror's expectation of privacy

No sensible interviewer or interviewee could complain about being researched online, nor could any politician, policeman, pupil or judge. In the civil courts, where a judge is the tribunal of fact, a legal team might conduct meticulous research of their opinions, and could not be criticised for doing so. Albeit that jurors are performing a unique public function, do they really have a reasonable expectation in 2013 that they will not be googled in court - anymore than when they give their name elsewhere?

But what if a barrister were to tailor a speech so clumsily and unsubtly that it became obvious that he had been online? "Imagine for a moment, members of the jury, that you were a huge fan of a particular football team - a brilliant team like Southend United for instance - in fact, suppose you were the chairman of the Supporters' Club..." The juror in question would probably not like it. Quite apart from anything else, he or she might be concerned about what personal information of theirs had been passed to the defendant.

Other problems could arise for counsel. What do you do if you discover that a juror has a disqualifying conviction, after they have been sworn? You might only be 80% sure that it is not a namesake. Should you ask the judge to enquire? And when would prosecution counsel have a duty to disclose to the defence information found online?

Prohibition

A simple blanket ban might be seen as the easiest solution. But where would this leave the defence's right to challenge for cause? Surely a defendant must be allowed to do some sort of research in order to find information which could form the basis of a justifiable challenge? It would have to be done quickly, in the minute or two between hearing the jurors' names read out and the jurors being sworn, but there might be good reason to try: a Pakistani defendant charged with the sexual assault of a white girl in Bradford, for example, might legitimately want to check the jurors' names against the BNP's membership list - which is freely available on Wikileaks.

And what if a juror is well known? Suppose prosecution counsel happens to know all about the strong views on rape held by juror Joe Bloggs MP. Would defence counsel, forbidden from using the internet, be expected to operate at a disadvantage?

The Code of Conduct is silent on the issue (unless researching jurors in this way is taken to be discreditable, disreputable, or prejudicial to the administration of justice - all of which, it seems to me, are arguable either way.) Senior judges have, for good reason, long resisted all attempts to undermine the secrecy and anonymity that attaches to juries, but the internet now presents a powerful threat - and many barristers would like to know where they stand. ●

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The Criminal Bar Association View

On 26 January 2013 the Criminal Bar Association published guidance for its members on this issue in its weekly round-up. CBA Chairman, Michael Turner QC, sets out the CBA view

There has been one report, as far as we know of a barrister googling a jury. The CBA's unequivocal view is that if anyone is tempted to do it, **DO NOT**.

It is outlawed by our current Code, and even if it wasn't we should not have to be told not to do it.

Codes infringed

The codes the practice infringed are in our views as follows:-

a. It would be discreditable to a barrister (Code para.301(a)(i));
b. It would be prejudicial to the administration of justice (Code, para.301(a)(ii)); and
c. It would be likely to diminish public confidence in the legal profession and the administration of justice, or otherwise bring the legal profession into disrepute (Code, para.301(a)(iii).

The other article in this edition on the same subject argues that the Code of Conduct is not clear and that many barristers would like to know where they stand. We disagree.

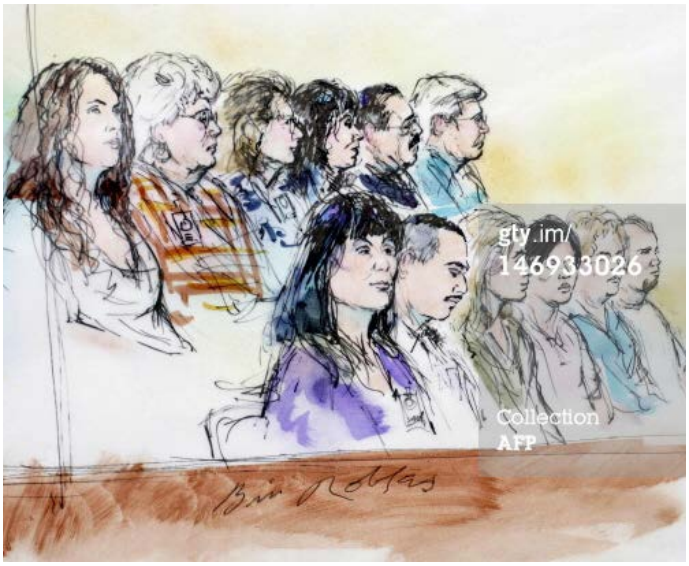
No benefit from googling a juror

We are curious as to what anyone would be seeking to address by googling a juror. I have practised for 31 years at the Criminal Bar and I have never sensed a problem with unrepresentative or biased juries. Nor have I felt in some way hampered by my lack of knowledge of them in addressing them.

We have never had a culture of jury vetting in this country and we seek and achieve getting a fair minded cross section of society by seeking to exclude jurors who may have been adversely affected by the crime which is the subject of the trial or whom may have a bias towards certain prosecution witnesses because of the nature of their work. Those of you old enough to have practised when we were able to challenge jurors will remember the conflicting views we had. Some would seek to challenge and have removed as many women as they could from rape juries, whereas many of us took exactly the opposite approach.

Inaccurate information

All those who practise in our criminal courts will agree that one of the reasons we seek to prevent jurors using Google themselves



is that we recognise that much of the information they could glean is not accurate. The same must apply if we were to start googling jurors. What steps is a judge to take when counsel tells him/her they have discovered a racist article on the internet in the name of one of the jurors selected. The judge could not dismiss that potential juror without an investigation - and what if that information turns out to be wrong?

Jurors are entitled not to have barristers or defendants digging around in their private lives either to seek to exclude them from jury service or alternatively craft their speech to appeal to one proclivity or another.

Every instinct should tell a practising barrister that such behaviour is unacceptable. ●

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