

Members of the jury – Guilty of incompetence?

SCEPTICISM about the ability of jurors (individually and collectively) to cope with the demands placed upon them is far from new. In a speech to the House of Lords in 1844 Lord Denman remarked: 'Trial by jury itself, instead of being a security to persons who are accused, will be a delusion, a mockery and a snare.' The question of juror competence remains a recurrent feature in both the research and policy literature (Horowitz *et al.*, 1996; Penrod & Heuer, 1997). Indeed, in 1998 the Home Office invited commentary on whether an alternative to the traditional jury system was appropriate for cases of serious fraud. This stemmed specifically from the proposition that lay persons may not be competent to evaluate particularly complex evidence, and was certainly fuelled by acquittals in well-publicised cases, such as that involving the Maxwells in the UK (see e.g. Doran & Jackson, 1997).

In this article, research regarding individual juror decisions (not *jury* decision making) is introduced in respect of two questions. Should trial by jury be waived for so-called complex cases? And are there circumstances under which pre-trial publicity might so 'contaminate' the minds of jurors that a fair trial is not possible? The first question prompts consideration of what constitutes complexity and, more particularly, of the ways in which



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jurors process complex information
and overcome pre-trial publicity.

individuals process 'complex' evidence in a more or less competent fashion. The second question deals with, among other things, the manner in which jurors deal with a judge's instruction to 'set aside' any prior knowledge about the case in question.

Models of juror decision making

Our theoretical framework for discussing these two questions (shown in Figure 1) considers two different, but potentially complementary, theoretical orientations that have been influential in much research concerning juror decision making: the story model (Pennington & Hastie, 1992, 1993b), and dual-process models of cognitive processing such as the heuristic-systematic processing model (Chaiken *et al.*, 1989; Eagly & Chaiken, 1993).

The story model posits that jurors employ story-like accounts to organise and interpret trial evidence. Competing accounts are said to be evaluated by a juror for (a) their plausibility – in respect of

trial evidence and the juror's knowledge of related events, and (b) their completeness – which draws on jurors' everyday experience with story forms, involving evaluative features such as internal consistency and overall coherence. Pennington and Hastie (1993a) propose criteria for a 'best fit', arguing that jurors then seek a match between a story that is acceptable, and their understanding of what constitutes the criteria for different categories of verdict.

Dual-process models are concerned with different modes of cognitive processing of information. The heuristic-systematic processing model (HSM) was developed for explaining the acceptance or rejection of argument and is therefore directly relevant to juror decision making. Two processing modes are argued to mediate juror understanding. The first, systematic processing, demands effort in the close scrutiny of information and is relatively comprehensive and analytic. The second mode, heuristic processing, involves less detailed scrutiny; at times the individual may follow simple persuasion heuristics, such as 'experts can be trusted', or implicit assumptions, such as 'there is no smoke without fire'. Both the story model and the HSM provide explanation at the core of the Figure 1 model – evidence processing.

Complexity and juror judgement

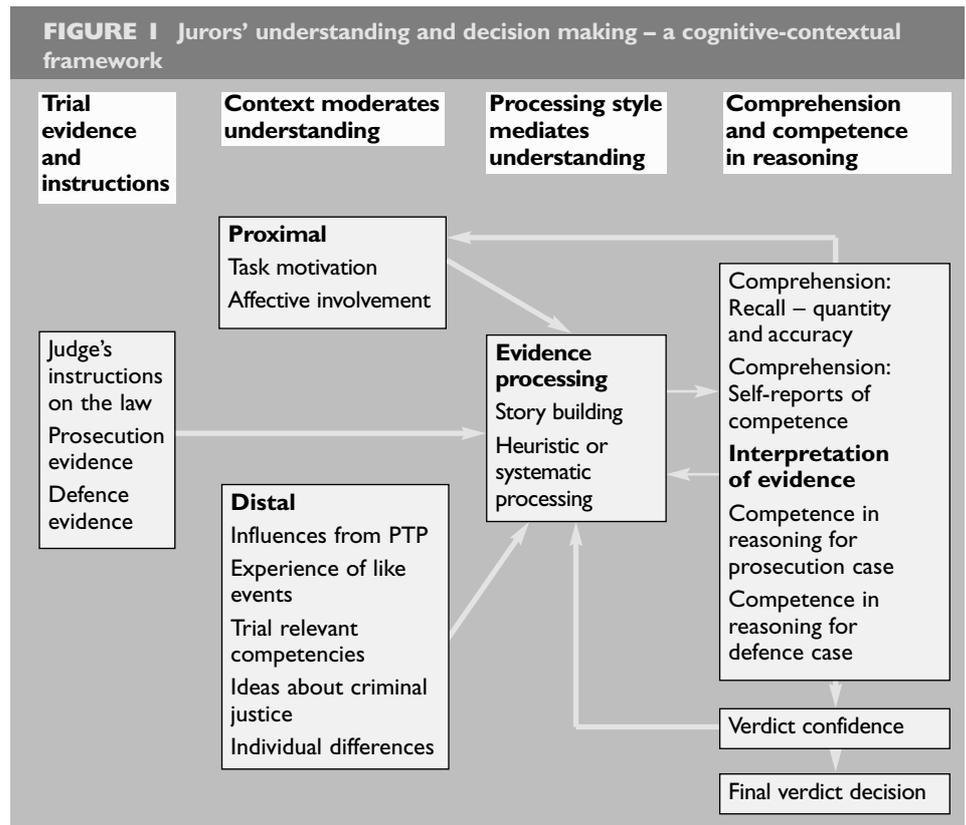
In discussing juror processing in complex cases, we need to consider what warrants the label of 'complexity'. Lempert (1981) suggested the criteria should include voluminous evidence, trial length and complex legal standards, whilst MacCoun (1987) included factors such as the number

of parties involved and technicality of evidence. Heuer and Penrod (1994) proposed three distinct components of complexity: evidence complexity (complexity of prosecution evidence, number of witnesses, length of trial, and number of charges), legal complexity (complexity of defence case and complexity of the law) and quantity of information (pages of documents, number of items of evidence, and number of parties). They suggested that each component may impact differentially on juror processing.

Empirical evidence tends to focus on fairly narrow operational definitions of evidence; nonetheless, powerful effects on juror processing have been shown. For example, Cooper *et al.* (1996) showed that jurors are more persuaded by an expert witness with relatively strong credentials (persuasion heuristics) when testimony is highly complex. This is consistent with the Chaiken *et al.* (1989) argument that 'heuristics should exert a greater biasing effect when recipients are motivated to process ambiguous messages but lack knowledge about the message topic'. In contrast, systematic processing is enhanced when complex evidence is presented in less technical language (Bourgeois *et al.*, 1993) and when note-taking is encouraged (Forsterlee & Horowitz, 1997).

Alongside evidence complexity, it is important to consider contextual factors that might moderate processing style. Figure 1 distinguishes proximal factors and distal factors. Proximal factors are defined here as those that are introduced within the immediate context of the trial. Of particular importance are degree of motivation and affective involvement. For example, Maheswaran and Chaiken (1991) demonstrate that higher motivation leads to the activation of systematic processing, and Johnson and Eagly (1989) show that affective involvement decreases the likelihood of the consideration of alternative interpretations – and consideration of alternatives is an important indicator of competence.

Distal factors include a number of important influences: media publicity about a particular case or about a category of cases ('generic prejudice'); direct experience of events similar to those described in evidence (such as a public-house brawl); trial relevant competencies (such as accountancy knowledge in a fraud trial); and specific ideas about the jury process (such as what constitutes



'reasonable doubt'). General attitudes may also have an influence. For example, some commentators have argued that juries are more likely to acquit if their sympathies with the defendant are easily aroused, and that individual jurors may argue for acquittal if they hold anti-police views (Vidmar *et al.*, 1997, provide a review of this proposition). Finally, distal factors are taken to include broad individual differences, such as authoritarianism (e.g. Berg & Vidmar, 1975), the capacity to 'set aside' and, in particular, differences relating to processing styles such as 'need for cognition' (Petty & Cacioppo, 1986). Individual differences of this kind have been shown to impact on juror processing, especially in relation to complex information (e.g. Smith *et al.*, 1996).

The two theoretical models offer different accounts of the role of individual differences. For the story model, Pennington & Hastie (1993b) argue that '[b]ecause all jurors hear the same evidence, and have the same general knowledge about the expected structure of stories, differences in story construction must arise from differences in world knowledge, that is, differences in experiences and beliefs about the social world' (p.196). This may account for individual differences in attributions about events that are both available and

accessible (e.g. Is it reasonable to carry a knife for self-defence?). However, complex or less familiar scenarios are likely to invoke only very general social scripts or knowledge about 'how the world works' (Lipe, 1991). Smith *et al.* (1996) also note the limitations of the story model in accounting for variation in jurors' use of probabilistic data. In contrast, dual-processing models posit relatively stable individual differences in processing style (Eagly & Chaiken, 1993, pp.314–315, provide a review).

Turning again to Figure 1, information processing serves both juror comprehension and quality of reasoning about evidence. Both empirical research (e.g. Kuhn *et al.*, 1994) and practitioner opinion (e.g. Home Office, 1998) suggest these as two categories of juror competence. There are well-established indicators for comprehension, such as quantity and accuracy of recall, but difficulties in comprehension may spark different processing strategies. For example, confusion may lead to a recourse to heuristics, hence the feedback arrow to 'evidence processing' in Figure 1. The juror's interpretation of trial evidence may also feed back (see Figure 1) into proximal factors, especially task motivation and affective involvement. For example, as the case proceeds, self-efficacy and motivation

may increase from a growing familiarity with the trial setting and terminology – it is now well established that repetition of complex material facilitates comprehension (Petty & Cacioppo, 1986).

Processing style is necessarily linked to quality of reasoning, but the measurement of quality is not well established. One focus in our studies (Charman *et al.*, 2001; Honess *et al.*, 1998) was the attempt to identify different degrees of quality of reasoning *during* the processing of trial evidence. These studies involved a video simulation of the opening statements of the Maxwell fraud case, which was complex in respect of each of the components proposed by Heuer and Penrod (1994, see above). Participants were told that it was their task to listen to the evidence presented and to reach a verdict in respect of one of the four defendants in the case. Data were collected at four points during the video presentation, and at each point participants were asked to summarise the evidence, to provide a verdict and to rate their confidence in this verdict. Each participant was assigned an interviewer who probed for information on reasons for verdicts and confidence levels and any changes or lack of changes in these between interview sessions.

All typed transcripts of the interviews were subject to detailed content analysis. Some categories were indicative of higher competence in that they reflected reasoning informed by probative matters, such as doubt about the standard of proof offered by the prosecution (e.g. 'there's been a lot of evidence on defrauding banks, but not specifically on defrauding the pension fund'), or questioning the relevance of the proposition, advanced by the defence, that 'if only Robert Maxwell hadn't died, the financial empire wouldn't have collapsed'. Interestingly, this form of defence argument parallels the use of lower competence reasoning based on the mental undoing of events (Bourgeois *et al.*, 1993). Other categories showed lower competence – what Petty and Cacioppo (1986) described as weak evaluative elaboration (e.g. 'sounds like he knew what was going on, but I'm not really sure').

There was good evidence from our studies that comprehension difficulties appeared to activate heuristics, and were associated with poorer evidence recall and lower quality of reasoning (consistent with the HSM as represented in Figure 1). Moreover, confidence in judgement was found to be closely associated with more

competent reasoning – that based on an informed elaboration of evidence.

In summary, our studies suggest that evidence interpretation will lead to interim verdicts (held with a particular level of confidence), which, consistent with the story model, will be informed by

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the fit between verdict category and selected story account. Confidence will itself impact on the differential activation of systematic and heuristic processing (see Figure 1) because once a sufficiency threshold for a final verdict has been reached, effortful processing of any kind is likely to be attenuated (Chaiken *et al.*, 1989). In other words, once jurors have made up their mind, they stop thinking about the evidence too hard.

Pre-trial publicity and juror judgement

The notion of a sufficiency threshold is particularly important when considering the impact of pre-trial publicity (PTP). In particular, pre-trial opinion may set up a pro-prosecution bias for a relatively uncritical endorsement of the prosecution case, resulting in a minimum of systematic processing and a failure to consider alternative versions of events.

There is, however, no adequate legal definition of the degree of prejudice that is so unacceptable that someone cannot fairly be tried – judges 'take each case on its merits' (see Corker & Levi, 1996 for the English courts, and Studebaker & Penrod, 1997, for the US). For example, quashing the convictions in *R. v. Taylor and Taylor* (1993), which involved *The Sun* newspaper allegedly doctoring a photograph, the Court of Appeal observed that 'during the trial the judge gave several warnings to the jury to decide the case on the evidence alone, and he gave a further appropriate warning to them in the summing up...but we find it quite impossible to say that the jury were not influenced in their decision by what they read in the press'.

Similarly, in *R v. Reade and others* (1993), the High Court judge who was to have dealt with the trial permanently stayed charges against the three police officers accused of having fabricated evidence against the Birmingham Six, on the grounds that the media coverage had so

'poisoned' public perceptions of the defendants that a fair trial would be impossible.

In neither case was any scientific evidence adduced to examine the propositions about the impact of the publicity, nor for that matter was there any evidence about the actual state of public opinion. Nonetheless, a general principle is that jurors should approach the evidence with as neutral an attitude as possible. Costantini and King (1980) capture the issue precisely: it is 'not whether prospective jurors hold pre-judging opinions but whether those opinions are of such strength that they cannot be set aside when confronted with evidence that may be offered in opposition to them' (p.17). This could be compounded in complex cases, where PTP may provide a readily available narrative framework in which to interpret subsequent trial evidence and 'fill' gaps in comprehension.

There has been substantial empirical examination of PTP and trial process, especially the 'set aside' issue (Kassin & Studebaker, 1998, and Studebaker & Penrod, 1997, provide good reviews). Of particular interest is the proposition that different types of PTP may operate through different mechanisms (Otto *et al.*, 1994) and therefore implicate different remedies (Kramer *et al.*, 1990). However, Studebaker and Penrod (1997) conclude 'information regarding the mediational processes by which pre-trial publicity exerts its effects is still needed' (p.428). A key distinction appears to be that between factual and emotional PTP. Information with a high emotional content is more likely to be remembered and may be more difficult to counter (Clark & Fiske, 1982). Although the mechanisms are not well established, Kramer *et al.* (1990) suggest emotional PTP may have greater coherence – more of a 'story structure' which, consistent with the story model (and see Figure 1), would prove especially salient for potential jurors.

The story structure argument is consistent with the processing differences discussed by Otto *et al.* (1994). They contrast 'online' processing, where PTP leads to an impression of the defendant that may influence judgement throughout the evidence presentation, and 'memory-based judgements', in which PTP information is utilised in the same way as trial evidence in order to inform verdict decisions. It could be argued that recall of emotional PTP may be more likely to evoke processing that leads to a general, more rounded,

impression of the defendant prior to the trial, whereas recall of factual PTP is more likely to be used in what Otto *et al.* call memory-based judgements.

We are exploring this issue in our current work (Honest *et al.*, in press) in which the influence of real-life PTP was examined using the video simulation of the Maxwell case discussed above. Participants' reasoning and verdict judgements during presentation of trial evidence were compared with their earlier recall of both 'emotional' and 'factual' PTP, their level of pre-trial case-knowledge and their pre-trial opinion about the defendant's culpability and character. The influence of emotional PTP was strong throughout all aspects of evidence deliberation, although its effect on verdict was shown to be mediated through participants' reasoning about evidence.

We agree with the recommendation reached in the meta-analysis by Steblay *et al.* (1999) – future research should continue to address the 'belief framework about culpability' engendered by PTP. We

should also disambiguate emotional PTP influence in respect of its setting up an explanatory framework from any direct impact of affective involvement.

Conclusion

So, can the two questions concerning juror competence and the prejudicial impact of PTP be answered on the basis of current empirical evidence? Our view is that whatever merits it may have on other grounds, such as cost savings, the abolition of the jury system for complex fraud trials is not warranted on the grounds of 'cognitive unfitnes'. We argue that, with modest screening, jurors are able to overcome comprehension difficulties and engage in the higher-quality reasoning indicative of competence (Honest *et al.*, 1998, provide detail). However, changes in case management that support the work of jurors are also necessary.

The question of staying a trial on the grounds of all-pervasive negative publicity is always balanced by broader social and political considerations (Rosemary West

received massive media coverage but was tried and convicted). Carefully conducted surveys could at least provide a more informed estimate of the extent to which PTP influences are widespread, particularly those relating to explanatory or affective frameworks. However, empirical evidence on trial management for selecting out potentially prejudiced jurors or assisting them to 'set aside' is still far from conclusive.

In summary, we hope that we have demonstrated that there is considerable potential for research – especially that which focuses on processing styles – to contribute to better trial management in respect of both competence and 'set aside' to the end of better-informed juror decisions.

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