The Jury Charge as a Reflection of How Adjudicators Make Decisions

Mr. Justice Ronald L. BERGER*[1]

[1] Court of Queen's Bench of Alberta, Edmonton, Alberta.

> *Juries, above all civil juries, help every citizen to share something of the deliberations that go on in the judge's mind; and it is these very deliberations which best prepare people to be free.*
>
> Alexis de Tocqueville, *Democracy in America*, 1835-1840

The simple proposition I advance for critical consideration is that the jury charge is a true reflection of how triers of fact filter and analyze evidence; if it is not, or if judges when charged with fact-finding do not themselves adhere to the strictures that bind juries, then I suggest we are engaging in an exercise in sophistry. I shall confine my comments to some of the fundamentals of a criminal jury trial.

Juries, of course, do not give reasons for their verdicts. It is presumed that members of a jury will follow the presiding judge's directions in the course of their deliberations. That is why appellate review of jury verdicts focuses upon the judge's charge to the jury.

In *R.* v. *Smith*,[1] Branca, J.A. said:

> *A jury is entitled to have the full theory of the case explained, that is to say, the case for the Crown and naturally, that which is equally if not more important, the theory of the case for the defence, so that the law which governs the offence is understandable, and the evidence bearing upon each issue of the charge is reviewed in a manner which will ensure that the jury addresses itself to the problems in issue which has a factual foundation in evidence, and in this manner to do justice as between the Crown and one who is charged with a criminal offence.*

Taschereau, J. in *Azoulay* v. *R.*[2] set out the trial judge's duty in charging the jury:

> *The rule which has been laid down, and consistently followed is that in a jury trial the presiding Judge must, except in rare cases where it would be needless to do so, review the*

> *substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them.*[3]

In a very instructive paper delivered in February of this year, Mr. Justice R.S.K. Wong of the B.C. Supreme Court made the following observations as to the mode of charging a jury:

> *it is generally considered that the preferred method to reviewing evidence is by analyzing it and relating it to the issues.*

Of course, it is not every theory and every defence that need be put to the trier of fact. Only defences that survive the "air of reality" test will be put to the jury. The matter was expressed in the following terms by the Supreme Court of Canada in *Kelsey* v. *R.*:[4]

> *The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial Judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance.*[5]

In *R.* v. *MacKenzie*[6] La Forest, J. made clear that it is both acceptable and desirable for a trial judge to focus the jury's attention on vital issues, and to direct their minds to the proper burden of proof on those discreet questions. In keeping with the earlier pronouncement in *R.* v. *Morin*,[7] La Forest, J. confirmed that a jury charge is in error if it leaves the jury with the impression that each item of evidence is to be considered piecemeal against the criminal standard of proof or if the jury is instructed to take a two-stage approach to their deliberations, whereby an initial fact-finding stage would weed out certain items of evidence, leaving the determination of guilt or innocence to be based only on the surviving evidence. Juries must not pre-select "items of evidence"; they must consider all the evidence in making a determination.

With respect, the analysis of Chief Justice Lamer in *MacKenzie, supra* is particularly helpful in this regard. Lamer, C.J. distinguishes carefully between facts and evidence. The proposition he advances is that while the trier of fact must always consider all of the evidence, and while individual "items of evidence" are not to be examined in isolation and rejected, and though evidence which may be of doubtful standing alone may nevertheless be corroborated or otherwise supported by other evidence, the trier of fact "can and must decide whether to accept or reject the **factual assertions** made by that evidence before it uses those factual assertions to support or infer other factual assertions towards reaching its verdict."[8]

Mindful of the foregoing, the Chief Justice went on, I respectfully suggest, to outline the mechanism of fact-finding which I submit is equally applicable to judges and juries in criminal cases:

> *An analogy I often used in charging juries, especially in cases where the Crown's case was circumstantial, was that of a fisherman's net. The evidence presented at trial by the Crown seeks to establish factual propositions. Once established, facts may be used to infer other facts. In this way, established factual propositions intertwine to construct a net of such propositions. If a factual proposition is established as a mere probability or likelihood, and not beyond a reasonable doubt, it cannot be used to infer any further facts. The interweaving of facts breaks down and there is a hole in the net. A net with a hole, however small, is no useful net at all, since there remains a critical factual proposition which is not consistent only with the accused's guilt. Thus, a fact which is not established beyond a reasonable doubt can play no part in the jury's decision to convict, either as a fact on which they rely to find an essential element of the offence, or as a fact used to infer such facts.*
>
> *Therefore, while it is a misdirection to instruct juries to reject evidence, to tell juries to reject factual propositions which the Crown's evidence does not establish beyond a reasonable doubt is to state the law correctly.*[9]

All of the foregoing evidences the very real concern on the part of the judiciary that the trier of fact embark upon its task armed with precise and detailed instructions as to the manner in which it should proceed. Little is left to chance. No one is under any misapprehension as to the rules that will govern the jury's deliberations. The verdict that follows whether agreed with or not,

bears the hallmarks of a principled, reasoned decision rather than one tainted by whim or arbitrary consideration.

What then of the pronouncements of judges sitting without the intervention of juries? There was, indeed, a time when it was thought sufficient for a judge to say: "where the evidence of `A' conflicts with the evidence of `B', I accept the evidence of `A' and reject the evidence of `B'". I suggest, that is no longer good enough. I am not unmindful of what Sopinka, J. noted in *R.* v. *Morin*:

> *A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was error in law in this respect.*[10]

That is not to say, however, that a judge sitting without a jury is in every case immunized from appellate review when reasons are not given. In *R* v. *Richardson*, Carthy, J.A. said:

> *There is no need that the reasons of a trial judge be as meticulous in attention to detail as a charge to a jury. In moving under pressure from case to case it is expected that oral judgments will contain much less than the complete line of reasoning leading to the result. Nevertheless, if an accused is to be afforded a right of appeal it must not be an illusory right. An appellant must be in a position to look to the record and point to what are arguably legal errors or palpable and overriding errors of fact. If nothing is said on issues that might otherwise have brought about an acquittal, then a reviewing court simply cannot make an assessment, and justice is not afforded to the appellant.*[11]

In fact, as Arbour, J.A. pointed out most recently in *R.* v. *Barrett*,[12] the factors in a given case may well compel a reasoned decision. *Barrett* was unusual on the facts: a jury case where the trial judge heard four days of evidence on the *voir dire* about the admissibility of statements, then reserved for six weeks, and then had his secretary tell counsel that he had decided to admit the statements on the basis of credibility. The appeal led to serious consideration of the issue of giving reasons. The Court held that reasons must be given for findings of fact made upon disputed

and contradicted evidence upon which the outcome of a case is largely dependant. The Court also held that the absence of reasons may require appellate intervention on the basis that:

> *[I]n the circumstances of a particular case, failure to give reasons affected the fairness of the proceedings so as to constitute a miscarriage of justice...*[13]

Furthermore, citing *Richardson, supra* with approval, Arbour, J.A. held that when no reasons are given "effective access to appellate review"[14] as an aspect of procedural fairness may be thwarted.

In my respectful opinion, it follows that adjudicators have a solemn duty to ensure that their judgments are received by litigants and by the community as the product of an independent mind driven by principled considerations. Every judgment should make clear that the adjudicator appreciates the competing theories and factual propositions (*Smith* and *MacKenzie*), understands the problems in issue (*Smith*), and recognizes the value and effect of the evidence (*Kelsey*). I do not suggest that the reasons of a trial judge need be as meticulous in attention to detail as a charge to a jury. I say only that the reasons should, at the very least, pass muster in terms of the fundamentals of a jury charge which I have set out above. Nothing less will do.

FOOTNOTES

1. *R.* v. *Smith* (1975), 25 C.C.C. (2d) 270 at 282 (B.C.C.A.).
2. *Azoulay* v. *R.* (1952), 104 C.C.C. 97, Taschereau J.
3. *Ibid.* at 98.
4. *Kelsey* v. *R.* (1953), 105 C.C.C. 97.
5. *Ibid.* at 102.
6. *R.* v. *MacKenzie,* [1993] 1 S.C.R. 212, La Forest J.
7. *R.* v. *Morin*, [1992] 3 S.C.R. 286, 76 C.C.C. (3d) 193.
8. *Supra* note 6 at 218 [author's emphasis].
9. *Ibid.*
10. *Supra* note 7 at 200.
11. *R.* v. *Richardson* (1992), 9 O.R. (3d) 194 at 201, Carthy J.A.
12. *R.* v. *Barrett* (1993), 13 O.R. (3d) 587.
13. *Ibid.* at 597.
14. *Ibid.* at 598.