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***The Appeal of a Criminal Jury Trial:
Why the Supreme Court of Canada Treads
Carefully Around Jurors' Toes
(And Appeal Courts should too!)***

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Introduction

Reviewing the verdict of a jury poses a particular dilemma for appellate courts. A recent case at the Supreme Court of Canada can serve to illustrate the point.

In *R v Mayuran*,¹ the Supreme Court of Canada overturned the majority decision of the Quebec Court of Appeal, upholding the jury's verdict convicting Suganthini Mayuran for the murder of her sister-in-law. The evidence was stacked against Mayuran. She was the only one in the family apartment with her sister-in-law when the latter was murdered. Her family members and an independent witness corroborated this circumstance. Her DNA and blood was found on the murder weapon and the victim's blood was found on her clothes. Two family members testified that she had confessed to killing the victim because the victim had ridiculed her about her learning ability and level of education. However, she later denied those statements, as well as her guilt, a fact which precluded her from pleading certain defences, most notably the defence of provocation. In the circumstances, the majority of the Court of Appeal found several errors in the trial judge's charge, but concluded that these errors could not

¹ 2012 SCC 31.

have influenced the verdict. They went on to find that the defence of provocation should have been put to the jury, and ordered a new trial.

The Supreme Court of Canada overturned this decision, finding that the defence had no “air of reality” so as to justify its submission to the jury. The accused had hinted at provocation in her declaration to the police, but that declaration had been properly excluded from the evidence.

The case highlights some of the key difficulties and controversies involved in the review of the jury’s verdict. For example, the “curative proviso” test used to determine whether an error in the jury charge influenced the verdict is particularly difficult to apply because juries do not motivate their decisions. In this context, it is difficult to assess why the verdict was rendered and whether a particular error would have made a difference. Second, the “air of reality” test is particular to jury trials and ensures that fact-finding issues are put to the jury while filtering out issues that might unnecessarily waste time or confuse the jury. In this process, there is a real risk that upper courts will simply substitute their view of the facts for that of the jury, effectively undermining the accused’s right to a jury trial. This tension between effective review of jury decisions to prevent wrongful convictions and protection of the jury’s independence is a recurring theme in criminal appeals.

The case is also representative of criminal jury trials in another respect: its outcome. In Canada, overturning a jury verdict is difficult, and practically impossible on grounds of factual error.² An unscientific review of 47 Supreme Court of Canada appeals of jury trials from 1975 – 2012 reveals that 30 out of 47 decisions resulted in the jury’s verdict being upheld. The score is particularly high for an appeal based on an unreasonable verdict or verdict unsupported by the evidence, where in 10 out of 13 cases, the verdict was upheld. For errors related to jury instruction, the verdict was upheld in 19 of 33 cases.

This begs the question: why is the Supreme Court of Canada reluctant to intervene in jury verdicts? In order to understand the issues, I will first consider the general arguments supporting deference to the jury, followed by the arguments in favour of jury control. Then I will examine the way in which appeal courts exercise control over juries through the appeal process, and look for common sources of intervention, which, by necessity, can only stem from errors in the trial judge's instructions to the jury.

I. Legitimacy of the Jury

The deference shown towards jury verdicts is first and foremost based on traditional arguments supporting the legitimacy and role of the jury in criminal trials as a whole. The role of juries in the common

² Lisa Dufraimont, “Evidence Law and the Jury: A Reassessment” (2008) 53 McGill LJ 199 at 209 [Dufraimont].

law tradition, particularly for serious criminal offences, is deeply rooted. In *R v Pan; R v Sawyer*, Arbour J., speaking for the Court, describes this tradition as a “vital component of our system of criminal justice.”³

The arguments supporting the legitimacy of the jury are summarized by L’Heureux-Dubé J., speaking for the majority in *R v Sherratt* in the following manner:

The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.⁴

Let us look more closely at the two main arguments raised here, namely the jury’s special competency at fact-finding and the jury’s democratic legitimacy.

1. Fact-finding

Juries are perceived as being particularly good at fact-finding for two main reasons.⁵ First, since the jury is made up of twelve ordinary people, from all walks of life, they represent a wider range of

³ [2001] 2 SCR 344, at para 41 [*Pan*].

⁴ [1991] 1 SCR 509, at p 523.

⁵ Jean-Claude Hébert, “Le jury : un canard boiteux?” (2003) R du B (numéro spécial) 311, p 323 [Hébert]; Dufraimont, *supra* note 2, at p 210.

experience and knowledge than a judge sitting alone. Second, the jury's group dynamic gives it a greater capacity to recall information and to conduct a more thorough examination of the evidence by exchanging on the elements of the evidence.

The belief in the jury's fact-finding ability underlies its role as trier of fact. As a result, courts show particular deference to the jury's fact-finding, a reality reflected in the jurisprudence on unreasonable verdicts and verdicts unsupported by the evidence.

Section 686(1)(a)(i) of the *Criminal Code* provides that the court of appeal may allow the appeal where it is of the opinion that "the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence." In applying this provision, the Supreme Court has emphasized that the Court of Appeal cannot simply substitute its appreciation of the facts for that of the jury. The test for an unreasonable verdict is stated by Pigeon J., speaking for the majority in *Corbett v R*:

As previously noted, the question is whether the verdict is unreasonable, not whether it is unjustified. The function of the court is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered.⁶

⁶ [1975] 2 SCR 275, at p 282.

While this approach is justified on the basis of general deference to a trier of fact, whether judge or jury, the Court also points to the “special qualities” of juries in the matter: “A final factor which the court of appeal reviewing for unreasonableness must keep in mind, is that the jury may bring to the difficult business of determining where the truth lies special qualities which appellate courts may not share.”⁷

As a result of the high standard for intervention, the SCC has very rarely declared a jury verdict unreasonable or unsupported by the evidence. Only three cases of the 13 reviewed since 1975 seem to have resulted in a finding that the verdict was unreasonable: *R v F (J)* (a case of incompatible verdicts),⁸ *R v Wise* (a case where the evidence against the accused was extremely slim),⁹ and *R v Molodowic*.¹⁰ In this way, the jury’s perceived special ability of fact-finding is used to justify deference to the jury’s verdict, particularly in the analysis on unreasonable verdicts.

2. Independence from the State

A second, potentially more important, justification for the jury’s role is its democratic legitimacy, both due to its representativity of lay persons and its independence from government.

⁷ *R v François*, [1994] 2 SCR 827.

⁸ 2008 SCC 60.

⁹ 2003 Carswell BC 101 [*Wise*].

¹⁰ 2000 SCC 16, 2000 CarswellMan 169.

The principles of jury secrecy and the selection of the jury amongst lay-persons representing the community ensure the jury's independence from the State, the judiciary, and any other outside influences.

These characteristics confer to the jury a particular legitimacy in the eyes of the public, and reinforce confidence in the administration of justice. As Jean-Claude Hébert points out, the public remains sceptical of judicial independence and sees judges as government actors.¹¹ In this context, juries lend greater legitimacy to the criminal process by ensuring that decisions are rendered by a body perceived as being entirely independent from the government, capable of rendering equitable decisions and protecting against the oppression of rigid laws. This justification is reflected in the treatment of jury trials as a constitutional right protected by section 11(f) of the *Charter of Rights and Freedoms*.¹² The jury's independence is further protected by rules limiting the judge's role in jury trials and protecting jury decision-making and secrecy. For example, in *R v Pan; R v Sawyer*,¹³ the Supreme Court considered a constitutional challenge to the jury secrecy rule. The Court justified the rule mainly on the basis that it was essential to the right to a jury trial because it protected the jury from outside influences and pressures, ensuring that jurors could freely express their opinions in the jury room and render honest, impartial decisions.

¹¹ Hébert, *supra* note 5 at p 327.

¹² *Ibid.*

¹³ *Pan*, *supra* note 3 at 42.

A number of Supreme Court interventions in jury verdicts can be explained not as jury-control, but rather as judge-control in order to protect the jury's role in decision-making. In *R v Krieger*,¹⁴ the jury's verdict of guilt was overturned because the judge had ordered the jury to convict, stating that they were bound to abide by his direction. Two jurors attempted to recuse themselves. The court found that the judge had deprived the accused of his right to a jury trial and ordered a new trial.

A similar situation occurred in *R v Gunning*,¹⁵ in which the judge told the jury that the Crown had made out the offence of careless use of a firearm, refused to submit the defence of property to the jury and instructed that the only question at issue was whether the accused had the intention required to commit murder. The Supreme Court of Canada found that by substituting his appreciation as to whether the accused had been "careless", the judge had usurped the jury's role. A judge is entitled to give an opinion on a question of fact, but not a direction. Further, a judge is not entitled to direct a verdict of guilty. The duty to keep from the jury affirmative defences lacking an evidential foundation does not detract from this principle.

Other examples of limitations of the judge's intervention include the "air of reality" cases, where the judge's failure to submit a defense to the jury is called into question. The test requires that the judge

¹⁴ 2006 SCC 47, [2006] 2 SCR 501.

¹⁵ 2005 SCC 27, [2005] 1 SCR 627.

submit a defense to the jury where there is evidence upon which a properly instructed jury, acting reasonably, could acquit if it accepted the evidence as true.¹⁶

As a variable standard, the test is used both to protect and to limit the jury's role in the trial. In *R v Fontaine*,¹⁷ the judge failed to put a defence of mental disorder automatism to the jury. The Supreme Court of Canada overturned the verdict on the basis that the accused had properly alleged facts relevant to the defence, and that in refusing to put the defence to the jury, the judge had substituted his appreciation of the probative value of the evidence for that of the jury. On the other hand, the test is also used to exclude the submission of certain questions to the jury, on the basis that: "... allowing a defence to go to the jury in the absence of an evidential foundation would invite verdicts not supported by the evidence, serving only to confuse the jury and get in the way of a fair trial and true verdict."¹⁸

As the air of reality test shows, these general arguments protecting the role of the jury evidently do not fully explain the treatment of jury verdicts on appeal. Although some intervention on appeal is directed at protecting the jury's free decision-making, many measures are in fact aimed at curbing certain perceived deficiencies of juries and ensuring some form of jury-control.

¹⁶ *R v Cinous*, 2002 SCC 29, [2002] 2 SCR 3.

¹⁷ 2004 SCC 27, [2004] 1 SCR 702.

¹⁸ McLachlin CJ and Bastarache J speaking for the majority in *R v Cinous*, *supra* note 16, at para 50.

II. Legitimacy of Jury-Control

Many of the characteristics of the jury that justify its role – its lay character, the unaccountability of its verdict – are also sources of mistrust.¹⁹ The fact that juries are composed of ordinary people is invoked to point out the jury’s vulnerability to giving undue weight to certain types of evidence, the possibility that jurors may misunderstand the law, or even that they may wilfully apply the law wrongly due to ingrained biases. The fact that the jury does not give reasons for its decision and deliberates in secret also makes correcting errors difficult and could be viewed as opening the door to arbitrariness.

These concerns have given rise to a variety of jury-control mechanisms, designed to curtail these risks. Measures developed to prevent jury bias include the jury selection process, change-of-venue rules, challenges-for-cause and peremptory challenges. Concerns that the jury will misunderstand or disregard the law are addressed through the juror’s oath, jury instruction rules, and the unusual rule that a party may not ask a jury to nullify a law through their verdict, although they can, in theory, still do so.²⁰ The risk of juries giving undue weight to unreliable forms of evidence is countered by the law governing

¹⁹ Dufraimont, *supra* note 2 at p 213.

²⁰ *R v Morgentaler*, [1988] 1 SCR 30, p 78-79.

evidence, by the judge's instructions to the jury and by the judge's power to review and comment on the evidence.²¹

The appeal process is now part of these jury-control mechanisms. This has not always been the case. The forms of jury-control that are considered effective and legitimate have changed a great deal over time. Prior to the 19th century, trial judges had large powers to control jury verdicts after they were rendered. Until 1670, jurors could be fined if their verdict did not accord with a judge's view of the case.²² In addition to having great influence on the use of the Crown's clemency power, the judge could also refuse to accept a verdict, inquire after the jurors as to its basis and send it back for reconsideration.²³

Around the 18th century, these ex-post methods fell into disrepute and were replaced with measures designed to *prevent* jury error rather than correct it, such as evidence law and jury instruction.²⁴ In this context, appeals of criminal trials were introduced in Canada in the 1892 codification effort to rationalize the criminal law,²⁵ to provide a mechanism for correcting judicial error in jury instructions and rulings on evidence, ensure a coherent development of the law of

²¹ Dufraimont, *supra* note 2 at p 216-217.

²² Benjamin L. Berger, "Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals" (2005) 10 Can Crim L Rev 1, at 4.

²³ *Ibid.*

²⁴ *Ibid.* at p 5.

²⁵ *Ibid.* at p 32.

evidence and of jury instruction, and address a continuing high frequency of wrongful convictions.²⁶

One can easily see why the old forms of jury-control might have lost their legitimacy. The conception of the jury as an independent decision-maker, with particular fact-finding abilities, to which the accused has a fundamental right, does not square well with measures that allow the trial judge to effectively override the jury's decision whenever he or she disagrees. The new forms of jury-control are correspondingly less intrusive on the jury's role.

III. The Criminal Appeal as Jury-Control

The appeal process for criminal trials allows appellate courts to control juries in a variety of ways. For indictable offences, an appeal brought by the accused may be granted in three circumstances: (1) where the verdict is unreasonable or cannot be supported by the evidence, (2) where the judgment should be set aside on the ground of a wrong decision on a question of law, and (3) on any ground when there was a miscarriage of justice.²⁷ The appeal may, however, be dismissed where no substantial wrong or miscarriage of justice occurred²⁸ or the “curative proviso”. The Crown has a narrower right of appeal, limited to questions of law.²⁹

²⁶ *Ibid.* at p 15.

²⁷ *Criminal Code*, RSC 9185, c C-46 s 686(1)(a) [*Criminal Code*].

²⁸ *Ibid.* s 688(1)(b)(iii).

²⁹ *Ibid.* s 676.

As discussed above, the provision on unreasonable verdicts allows appellate courts to control juries by intervening directly in their fact-finding. Although the appellate court may not fully substitute its own appreciation of the evidence for the jury's, the Supreme Court of Canada has also emphasized that review under s. 686(1)(a)(i) requires that the appellate court re-examine the sufficiency of the evidence to a certain extent.³⁰ For example, in *R v Wise*,³¹ the Court of Appeal examined the weight of the identification evidence against Wise in reaching the conclusion that a conviction was simply not within the reasonable possibilities available to the jury. The test also explicitly gives judges the power to override verdicts that “conflict with the bulk of judicial experience”.³² This provision addresses a concern for the jury's lack of experience by allowing appellate judges to intervene by calling upon the court's knowledge of the law and experience.³³ Although the SCC was careful in specifying that this is not an invitation for the judge to substitute his personal opinion and experience,³⁴ one can see how this test leaves ajar the door to allowing judges a final say on the verdict.

Secondly, the power to review questions of law may be used to control what issues are put to the jury, the content of the jury charge and the admissibility of evidence. As stated earlier, the “air of reality”

³⁰ *R v Yebes*, [1987] 2 SCR 168, at p 186; cited in *R v François*, [1994] 2 SCR 827, at para 12.

³¹ *Wise*, *supra* note 9, confirming the majority opinion in *R v Wise*, 2002 BCCA 80, 2002 CarswellBC 145.

³² *R v Biniaris*, [2000] 1 SCR 381 at para 40.

³³ *Ibid.* at para 41.

³⁴ *Ibid.* at para 41.

test used to determine whether a defence should be put to the jury filters out certain alleged defences in order to avoid confusing the jury and to reduce the risk of verdicts unsupported by the evidence.³⁵ The degree to which the test allows the judiciary to evaluate the weight of the evidence is a matter of some contention. Although everyone seems to agree that the judge must not assess credibility, weigh the evidence or make any findings or inferences in so doing, the division of the Supreme Court in *R v Cinous*³⁶ is telling. While the majority found that there was no evidence to support the contention that the accused reasonably believed that he had no alternative to murder (an element of self-defence), the dissent found that the accused had alleged a subjective belief that there was no alternative, and that this was sufficient to justify submitting the question of the reasonability of that belief to the jury. The majority opinion seems to suggest that, like the test for unreasonable verdicts, the “air of reality” test allows the court, to a certain extent, to examine the value of the evidence.

Appellate courts also intervene in the content of the charge to the jury, sometimes providing detailed, step-by-step guides to instructing the jury on certain critical elements such as the essential elements of the relevant offences, proof beyond a reasonable doubt and the treatment of certain types of evidence. In *R v Daley*,³⁷ for example, the majority gave an eight-step breakdown of the elements of

³⁵ *R v Cinous*, *supra* note 16 at para 50.

³⁶ *Ibid.*

³⁷ *R v Daley*, 2007 SCC 53, [2007] 2 SCR 523.

a typical jury charge. Another example is the often-cited *Vetrovec* case, in which the court described the four essential elements of a restrictive directive on the testimony of a potentially untrustworthy witness.³⁸

The rate of intervention in jury instruction cases suggests that this mode of jury-control is much less controversial than intervention through the unreasonable verdict provision, for example. One can easily see why it is essential that the jury be properly informed of the elements of an offence that the Crown must prove, and why such errors, which are strictly errors of law, should be corrected. A similar analysis might apply to general instruction on the standard of proof beyond reasonable doubt.

Appellate intervention becomes slightly more contentious, however, when deciding the extent to which judges ought to give restrictive directives regarding certain types of evidence. In this area, the line between the judge's role and the jury's fact-finding role becomes blurred. The difficulty resides in the fact that the appropriate treatment of certain types of evidence, such as evidence of post-offence conduct, or the testimony of a potentially untrustworthy witness, varies depending on the circumstances.³⁹ As a result, a judge's instructions on the use by the jury of certain types of evidence may be too restrictive, or not enough. Furthermore, the extent to which

³⁸ *Vetrovec v The Queen*, [1982] 1 SCR 811.

³⁹ See *R v White*, 2011 SCC 13, [2011] 1 SCR 433.

judges should caution and restrict the use of certain forms of evidence is based on assumptions about the competency of juries to evaluate that evidence. For example, in *R v Khela*, the majority restated the four essential elements of a *Vetrovec* directive, namely:

(1) drawing the attention of the jury to the testimonial evidence requiring special scrutiny; (2) explaining *why* this evidence is subject to special scrutiny; (3) cautioning the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true; and (4) that the jury, in determining the veracity of the suspect evidence, should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused.⁴⁰

The majority further specified that the other sources referred to must be independent and material.⁴¹ However, Justice Deschamps disagreed on the fourth element of the charge, finding that it unduly restricted and distracted the jury from the task of evaluating evidence in a flexible and rational manner. In her concluding statement, she points to the link between the law of evidence and trust in the jury's competency: "There has been a general trend in the law of evidence towards more flexible rules, as trial judges and juries are shown the trust they need to perform their fact finding duties properly. The majority's decision in this case is a step back from that trend."⁴²

⁴⁰ *R v Khela*, 2009 SCC 4, [2009] 1 SCR 104.

⁴¹ *Ibid.* at para 39-40.

⁴² *Ibid.* at para 99.

IV. Appellate Intervention: A Question of Trust

In this way, appellate intervention in jury instructions depends on the assumptions judges make about the jury's ability to properly understand legal concepts and evaluate certain types of evidence. The extent to which this judicial mistrust is justified is difficult to ascertain. Due to the jury secrecy rule, determining the extent to which control is justified in a given situation rests on a certain degree of speculation and assumptions. For example, the "curative proviso" stage of appellate analysis requires judges to speculate whether an error made by the judge was likely to have caused a wrongful conviction when evaluating errors of law. The Supreme Court explicitly recognized this in *R v Sarrazin*:

This assessment is necessarily somewhat speculative, as no one really knows what the *actual* jury would have done if its members had been properly presented with all of the verdicts that might reasonably have arisen on the evidence. Of course, no one *can* know, since members of the jury cannot be questioned after the trial.⁴³

[Emphasis in the original]

Many dissenting opinions on jury instruction can be explained by a varying degree of trust in the competency of juries. In *R v Sarrazin*, the Court was called upon to consider whether a judge's failure to give instruction on attempted murder could reasonably have had an impact on the verdict. The medical evidence on the victim's death cast some

⁴³*R v Sarrazin*, 2011 SCC 54 at para 22, [2011] 3 SCR 505 [*Sarrazin*].

doubt as to whether the injuries inflicted by the accused had in fact caused the death. The majority found that the failure to give the jury an alternative verdict to murder might have induced the jury to convict despite the fact that they might have otherwise had some doubt as to the medical evidence, because they did not want to acquit a person who had intended and attempted to kill. They argued that the choices available have an influence on the outcome of the verdict. However, Cromwell J., writing for the dissent, argued that this conclusion rests on the assumption that the jury violated the standard of proof beyond a reasonable doubt. If the jury had found that the accused had the intent to kill, but did not in fact cause the death, the application of the standard of proof required the jury to acquit. Cromwell J. strongly denounced the assumptions of incompetency that underlie this conclusion:

Respectfully, this is an elegantly understated way of expressing what to me is an unacceptable proposition: appellate courts should assume that a jury might relax the standard of proof of causation because the alternative would be to let the accused walk. I cannot agree, on such speculative grounds, to set aside a jury verdict of 12 citizens who are presumed to have honoured their oath and who received impeccable legal instructions on the very issue in contention. [...] This sort of speculation at the jury's expense has no basis in fact and necessarily imputes to the jurors — and all 12 of them at that — a “subconscious” failure to fulfill their sworn duty.⁴⁴

⁴⁴ *Ibid.* at paras 53-54.

In cases involving the jury charge on reasonable doubt, this disparity of trust in the jury manifests itself in assumptions about jury members' understanding of reasonable doubt. In *R v Rhee*,⁴⁵ the judge instructed the jury that “reasonable doubt” was to be understood in its ordinary meaning, without specifying that it was a more stringent test than the balance of probabilities. The majority found that the charge was in substantial compliance with the elements of a charge on reasonable doubt as described in *R v Lifchus*.⁴⁶ Justice LeBel, in dissent, argued that the charge invited the jury to apply the ordinary standard of proof for decision-making that they use in their everyday lives, which is in fact a balance of probabilities. In his view, the judge’s failure to emphasize the special, onerous character of reasonable doubt created a reasonable likelihood that the jury misunderstood the appropriate standard. One might well conclude that this decision rests on assumptions about the degree to which ordinary people understand the presumption of innocence before they step into the courtroom.

A similar division can be observed on charges pertaining to evidence, such as in *R v Van*,⁴⁷ in which a police officer’s testimony contained some elements of hearsay and contained a suggestion that the police officer’s opinion as to the accused’s guilt was based on proof not presented at trial. The judge had failed to caution the jury in relation to this testimony. A majority of five judges found that a

⁴⁵ 2001 SCC 71, [2001] 3 SCR 364.

⁴⁶ *R v Lifchus*, [1997] 3 SCR 320.

⁴⁷ *R v Van*, 2009 SCC 22, [2009] 1 SCR 716.

reasonable jury would not have relied on the hearsay elements and the police officer's authority to decide the case. The four judges in dissent, however, felt that the police officer's testimony could have induced the jury into believing his opinion was more informed and worthy of respect than it really was, and that lay persons were likely to give too much weight to an experienced authority figure such as a police officer. Again, one can surmise that the division of the court, here, rests on a differing degree of mistrust in the jury's ability to assess the credibility of certain witnesses and certain types of proof.

The foregoing analysis suggests that consistency and predictability in appellate intervention in jury verdicts could be improved by objective evidence of juries' capabilities. Some research conducted on American simulated juries suggests that juries are in fact "remarkably competent" at fact-finding in general.⁴⁸ However, reviewing the scientific literature on the question, Lisa Dufraimont identifies certain issues that juries have greater difficulty with: understanding legal instruction, properly evaluating statistical, scientific and expert evidence, and giving proper weight to eyewitness identification and confessions arising from police interrogations.⁴⁹ Proper identification of the true risks in jury trials and reference to that evidence to support appellate intervention may help reduce dissent and improve the legitimacy of appellate intervention. Scholars are not

⁴⁸ Reid Hastie, Steven D Penrod & Nancy Pennington, *Inside the Jury* (Cambridge, Mass.: Harvard University Press, 1983) at 230, cited in Dufraimont, *supra* note 2, at p 231.

⁴⁹ Dufraimont, *supra* note 2 at 232.

alone in their support of this view. In *R v Find*, the Court was called upon to address allegations of widespread jury bias in sexual assault cases. In response to some preliminary studies put forward on the question, the Court expressed the following opinion:

The attempt of Vidmar and others to conduct scientific research on jury behaviour is commendable. Unfortunately, research into the effect of juror attitudes on deliberations and verdicts is constrained by the almost absolute prohibition in s. 649 of the *Criminal Code* against the disclosure by jury members of information relating to the jury's proceedings. More comprehensive and scientific assessment of this and other aspects of the criminal law and criminal process would be welcome.⁵⁰

Therefore, there is ample support for the view that a deeper empirical understanding of the difficulties faced by juries might help focus jury control measures where they are truly needed and reinforce the legitimacy of appellate intervention.

V. The Appeal of a Criminal Jury Trial: A Delicate Balancing Act

The foregoing analysis suggests that appellate review of jury verdicts involves competing objectives. On the one hand, protection of the jury's autonomy, reflected in its lay character, unaccountable verdict and secret deliberation, is one of the Supreme Court's primary concerns. On the other hand, the jury is perceived as entailing some vulnerabilities that justify jury-control measures. Certain types of measures, such as jury instruction, are considered less intrusive on the

⁵⁰*R v Find*, 2001 SCC 32 at para 87, [2001] 1 SCR 863.

primary function of the jury than others, and therefore give rise to greater intervention. The degree to which courts are willing to intervene in such cases depends on the degree to which the Court buys into mistrust of the jury's competency. Since jury decisions and deliberation are protected by jury secrecy, the Court's decision often rests on assumptions about the jury's abilities and reasoning.

It may be that the Supreme Court's overall reluctance to set aside jury verdicts may be explained by this degree of speculation. In the absence of empirical evidence of incompetency, it makes sense to err on the side of caution and give the jury the benefit of the doubt. When this non-intervention in a jury verdict gives rise to a conviction, one might question whether the presumption of innocence commands the opposite approach. In cases of doubt, should appellate courts protect the jury's autonomy, or the freedom of the accused? The answer lies in the rule that once an accused has been found guilty, the presumption of innocence no longer applies.