

# Jury Issues Arising From Use of Technology and Social Media

By: James Cotter, LLB, BComm & Leah Volkers, JD, BA

In today's world, the use of technology in our day to day lives has become commonplace. Smartphones, tablets and laptops are everywhere, and people's use of the internet is at an all-time high. It is not surprising that one of the issues that has arisen in the context of the modern day jury is the jurors' use of technology and social media. Society's increasing reliance on technology has raised new concerns with how jurors are using technology before during and after the trial, as well as the lawyers' use of technology in assessing potential jurors.

Concerns about juries and potential misconduct did not suddenly appear with the advent of technology. There have been issues with juror misconduct as long as there have been juries. A famous example is Gillian Guess, a juror on a murder trial in BC who had an affair with the accused during the trial in the mid-nineties. She was convicted of obstruction of justice.<sup>1</sup> The new concern with jurors is just how easy it is for jurors to engage in misconduct, compared to the pre-technology era.

In 2010, Reuters did a review of US cases on Westlaw and found that there have been over 90 cases in the US since 1999 where a new trial has been ordered or a verdict overturned because of juror actions in relation to the internet. Over half of those 90 cases occurred between 2008 and 2010.<sup>2</sup>

Reuters also monitored Twitter for three weeks between November and December 2010 for any tweet that included the term "jury duty". The results were surprising with one post coming in approximately every three minutes. Reuters reported that many of those posts were complaints about being called for jury duty, but that a significant number of tweets included comments about the defendant's guilt or innocence.<sup>3</sup>

In Australia, two professors conducted a research project in February 2013 with 62 Australian judges, magistrates, tribunal members, court workers, court public information officers and academics working in the field of judicial administration. Participants

---

<sup>1</sup> *R v. Guess*, 2000 BCCA 547

<sup>2</sup> Brian Grow, "As Jurors Go Online, US Trials Go Off Track", *Reuters* (December 8, 2010) online: <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUUSTRE6B74Z820101208>.

<sup>3</sup> Grow, *supra* note 2.

indicated that juror misuse of social media (and digital media) leading to aborted trials was their biggest concern.<sup>4</sup>

The concern about jurors and their misuse of the internet and social media is very real. In the summer of 2014, the Attorney Generals of the UK, US, Canada, Australia and New Zealand met in London to discuss how to preserve the jury system in the internet age.<sup>5</sup>

There are also blog sites appearing that track some of the jury misconduct that is occurring in the US. One is called Jurors Behaving Badly which self describes itself as:

*A blog about the very small percentage of jurors who fail to follow the judge's instructions, including doing independent internet research, using social media (such as Facebook) to contact parties and lawyers, and blogging about the trial. Juror misconduct frequently results in mistrials and a waste of resources. Links will be provided to sample jury summonses, jury instructions, and other resources to improve juror education and minimize juror misconduct, thereby promoting fairness of trials.*<sup>6</sup>

As the blog description notes, it is likely a small percentage of jurors that fail to follow a judge's instructions. But that small percentage can have a large impact and impose a large burden on the justice system, both in terms of the cost of re-running trials that has collapsed as a result of juror misconduct, and in the maintaining the integrity of the justice system and the right to a fair trial.<sup>7</sup>

Another blog site, titled Juries, has a section on misconduct and technology. The latest posts from the website including a post on April 19, 2015 where a US judge ruled that a jury member's tweets during trial were not related to facts of the case and were not grounds to overturn a criminal conviction for murder, and a post on February 13, 2015 where a juror in Memphis was sentenced to ten days in jail for communicating with a criminal defendant via Facebook.<sup>8</sup>

---

<sup>4</sup> Professor Patrick Keyzer & Associate Professor Jane Johnston, "Juries and Social Media in the Technological Age", *Supreme Court of Victoria Blog* (Aus), (November 14, 2014), online:

<http://www.supremecourt.vic.gov.au/home/contact+us/supreme+court+blog/juries+and+social+media+in+the+technological+age>.

<sup>5</sup> Owen Bowcott, "Attorney Generals to Debate Role of Juries in Internet Age", *The Guardian*, (July 7, 2014) online: <http://www.theguardian.com/law/2014/jul/07/attorney-generals-juries-internet-age>.

<sup>6</sup> Jurors Behaving Badly, online: <http://jurorsbehavingbadly.blogspot.ca/>

<sup>7</sup> In Canada, jury trials are much less frequent than in the United States. As such, many of the examples I will rely on in this presentation come from the US and other jurisdictions.

However, the examples remain representative of jurors' potential use of technologies.

<sup>8</sup> Juries, (April 21, 2015) online: <http://juries.typepad.com/juries/jurors-and-technology/>

## **The Challenge of Maintaining Impartiality and Ensuring a Fair Trial**

Juries are able to inform themselves of matters relating to the case they are hearing in ways that were never possible in the past. The ease of access to technology and the internet has made it easy for jurors to access a whole host of information about the case they may be involved with in a very short time frame.

### **The Notion of Impartiality**

The traditional concept of a jury was of 12 individuals who had no information on anyone involved in the case. They could hear the evidence presented by both sides, deliberate, and deliver judgment without any outside influence. There was no risk of compromising the impartiality of the jury.

Juries were instructed not to seek outside information about the trial, to not communicate with anyone about the trial, and to use only the evidence presented to them during the formal trial process to reach their decision.<sup>9</sup>

On the Justice BC website, it states that jurors are expected to make up their own mind based on the evidence provided at the trial and are not allowed to discuss the details of the case, including reasons for a verdict with anyone outside the courtroom.<sup>10</sup>

This traditional concept of a jury and their ability to remain completely closed off from outside sources to remain impartial is being challenged by society's increased use of technology and access to information. Now, juries, and individual jurors, have the ability to access and share information related to the case with a few taps on their smart phone screens.

### **Ensuring a Fair Trial**

A new term that has emerged is "Trial by Google". It's a fitting term in that jurors are now able to assess the case by entered a simple query into Google to access a variety of internet sources, including media coverage of the trial and to conduct their own independent research on legal terms and concepts. This has resulted in many problems inside the courtroom and risks upsetting the balance of the accused's right to a fair trial and the right of the jurors, and public, to be informed.<sup>11</sup>

The problem with this newfound access to information is that, unlike in the courtroom setting, there is no judge controlling the evidence that is admissible to go before the jury. With

---

<sup>9</sup> Grow, *supra* note 2.

<sup>10</sup> "Jury Duty Instructions", *Justice BC*, online:

[http://www.justicebc.ca/en/cjis/you/juror/selection\\_process/instructions.html](http://www.justicebc.ca/en/cjis/you/juror/selection_process/instructions.html)

<sup>11</sup> Keyzer & Johnston, *supra* note 4.

technology, the jurors have access to any information they want, and the judge is not able to advise them of which evidence is prejudicial, and which evidence should be considered accurate and reliable enough to inform the jury's decision in that particular case.

UK Attorney General Daniel Grieve aptly summarized the concerns associated with "Trial by Google":

*'... The internet is a haystack of material, scattered with the odd prejudicial needle, as it were. Trial by Google allows a juror to locate the haystack, find the needle, pull it out and ascribe significance to it that it simply would never have had otherwise. It takes a minor risk and turns it into a major risk.'*<sup>12</sup>

### **Looking up Information, or Communicating with the Parties or the Lawyers**

Facebook, LinkedIn, and other online profile sites provide easy access to personal information. Any juror has the potential to gain access to at least some information on the parties, plaintiff and defendant, or accused. This type of information can inform a juror's opinion of the parties, or the case, and potentially impact their ability to view each side without bias from the very outset of the trial.

The juror is also able to obtain information on the lawyers representing each side, both through formal firm websites and the online profile type sites mentioned above. This allows the juror to see what type of firm the lawyer works for, and potentially other cases the lawyer has worked on. This type of information can inform a juror's opinion of the lawyer running the case, and potentially impact impartiality.

Jury instructions in most jurisdictions now include some mention of the use of the internet and social media by jurors during the trial. In the US, jurors are advised not to use any technology to do any research or independent investigations into the case, including being advised to not use Google Earth to visit the scene of an accident or crime.<sup>13</sup>

One interesting, and surprising, example of a juror looking into the personal information of a party/ lawyer occurred in West Virginia in June 2010. In a case involving a sheriff's deputy that was convicted of corruption, one juror went so far as to contact the defendant directly through MySpace. As a result, the West Virginia Supreme Court of Appeals ordered a new trial.<sup>14</sup> In this case the juror was fined \$500.

---

<sup>12</sup> Keyzer & Johnston, *supra* note 4.

<sup>13</sup> NPR staff, "For Modern Jurors, Being on a Case means being offline", *National Public Radio*, (June 24, 2013) online:

<http://www.npr.org/blogs/alltechconsidered/2013/06/24/195172476/JURORS-AND-SOCIAL-MEDIA>

<sup>14</sup> Grow, *supra* note 2.

This same type of contact also occurred in the UK in 2011 when a juror exchanged Facebook messages with an accused in a criminal trial and conducted online investigations of another defendant during deliberations. In this case the juror was sentenced to 8 months in prison for contempt of court.<sup>15</sup>

In Brisbane in 2014, a murder trial had to be aborted after 10 days when one juror informed the court that another juror had conducted Facebook investigations online.<sup>16</sup>

### **Jurors Self-Informing: Online Legal Research**

Not only can jurors inform themselves on the particulars of the case, parties, and counsel, but they can also conduct their own independent research to inform themselves of legal terms, concepts and other case law.

In a drug trial in New Jersey in 2011, the foreman of the jury looked up information online that he thought applied a mandatory minimum sentence to the defendant if found guilty. However, the information was inaccurate and resulted in a deadlocked jury and a mistrial. The juror was fine \$500.00.<sup>17</sup>

In September 2010, a Florida appellate court overturned a manslaughter conviction after a juror used an iPhone to look up the definition of “prudent” online.<sup>18</sup>

In Victoria, Australia, the Juries Commissioner reported only three instances of jurors doing outside research during a trial between 2011 and 2014 and one juror cited for using Facebook inappropriately. However, the Commissioner noted that the Courts are reliant on the jurors themselves to self-report any misuse of social media.<sup>19</sup>

In Williamsburg, Virginia, the Director of the Centre for Jury Studies reported that she hears about jurors who have looked up legal terms on the internet or commented about their jury experience using social media about once a week in the US, and those are only reported cases or instances admitted to.<sup>20</sup> While the US has significantly more jury trials than Canada, this number is still indicative of the fact that a number of jurors are likely engaging in prohibited uses of technology during the trial.

There is some suggestion that allowing jurors access to outside information could be beneficial. Instead of fully banning jurors’ use of technology, the courts should shift gears and help to guide jurors in how to use technology in a responsible way. If we are capable of

---

<sup>15</sup> Keyzer & Johnston, *supra* note 4.

<sup>16</sup> *Ibid.*

<sup>17</sup> NPR staff, *supra* note 12.

<sup>18</sup> Grow, *supra* note 2.

<sup>19</sup> Keyzer & Johnston, *supra* note 4.

<sup>20</sup> NPR staff, *supra* note 12.

dispelling the notion that any one individual will be entirely impartial regardless of their access to external information, then allowing juror's access could result in a jury that is more engaged with the process.<sup>21</sup> What exactly this would look like is unknown, but it is an option the court could consider in evolving the role of jurors with the advent of technology.

### **Media Coverage of the Trial**

Access to multiple news sites is easy. With a simple search using one of a whole host of search engines (Google, Bing, Yahoo), the potential juror could obtain news reports relating to the case, other similar cases, and regular updates.

Each news outlet will present the story their own way, but regardless, any potential juror accessing multiple reports on the alleged incidents prior to trial can affect their perception of the parties and unduly prejudice them. It would be virtually impossible to not be impacted by the media's portrayal of events.

Like a juror doing independent legal research on the law or the parties, access to media coverage, online blogs, and detailed reports of the case right unduly prejudicing the juror with 'facts' that are not put before then in the trial itself.

### **Making up Your Own Mind: Maintaining Confidentiality and Avoiding Prejudice during the Trial and Deliberations**

A juror also has the potential to divulge what is happening during the trial and during jury deliberations to the world. The use of social media by jurors during the trial has garnered attention on a number of occasions.

It has become standard practice to advise a juror prior to the commencement of jury duty that they are not allowed to use Facebook, Twitter, text messages, blogs, or other internet sources to communicate information about the trial.<sup>22</sup>

This has not stopped jurors from using these sites during the trial and deliberations and it has a two way effect. First of all, jurors can divulge information to the public that is supposed to be confidential, including how the decision was reached during deliberations. Secondly, jurors can provide information and solicit responses from social media, thereby influencing their decision making process directly both during the trial itself and in the deliberations process.

---

<sup>21</sup> Grow, *supra* note 2.

<sup>22</sup> NPR staff, *supra* note 12.

## **Tweeting and Facebooking Before or During the Trial**

Jurors are now capable of reporting on the trial as it takes place. Every time there is a lunch break, jurors have the potential to be on their smart phones, reporting on the events of the day. Reports could be posted on Facebook and Twitter, as well as on other social media sites.

Jurors continue to share information about the trial online, despite direct instructions from judges advising jurors not to use the internet and social media to communicate about the trial. The result of such misconduct can result in the juror being removed from the jury, or a mistrial being declared.

Interestingly, it appears that a juror's online presence prior to the trial commencing can also create the risk of a mistrial. In Canada in 2012, a mistrial was declared in Fred Prosser's first degree murder trial when it was discovered, by the family of the victim, that juror number twelve had posted on an anti-Prosser Facebook page prior to being selected as a juror. The family of the victim were running the names of the jurors through social media sites when they discovered juror number twelve's comments on Facebook.<sup>23</sup>

## **Use of Social Media During Deliberations**

The bigger risk to confidentiality with jurors is them sharing information on social media during deliberations. Traditionally, deliberations have been entirely confidential and free from scrutiny. However, there have been incidents of jurors reporting the goings-on during deliberations on the internet, and even worse, there have been jurors reporting the events and then actively seeking feedback.

A UK juror was dismissed from a child abduction and sexual assault trial after she asked for her Facebook friends to help her decide on the verdict. She wrote: "*I don't know which way I am going, so I'm holding a poll*".<sup>24</sup>

A juror in the US tweeted during deliberations, and as a result the Supreme Court in Arkansas reversed a death sentence.<sup>25</sup>

In another example, a Connecticut juror wrote on Facebook that jury duty was "boring," asking for "[s]omebody [to] get me outta here." The same juror announced "Guilty :)" on her Facebook page on the same day as the verdict.<sup>26</sup>

---

<sup>23</sup> "Mistrial Shows Influence of Social Media in the Legal System", *CBC* (July 19, 2012) online: <http://www.cbc.ca/news/canada/new-brunswick/mistrial-shows-influence-of-social-media-in-legal-system-1.1168815>.

<sup>24</sup> Keyzer & Johnston, *supra* note 4.

<sup>25</sup> Andi Argast, "The Jury is Out: Smartphone Use in the Courtroom", *Legal Aid Ontario* (May 27, 2013) online: <http://blog.legalaid.on.ca/2013/05/27/the-jury-is-out-smart-phone-use-in-the-courtroom/>

## What Can be Done to Prevent Misuse of Social Media

With all these examples of jurors continued use of social media and internet during trials, what can be done?

The 2014 meeting of Attorney Generals in London considered options such as creating a new criminal offence when a juror disobeys the instructions of a judge and giving judges the power to search for and confiscate electronic devices for the duration of the trial.<sup>27</sup>

A recent report commissioned by the Standing Council on Law and Justice in New South Wales, Australia, indicates that the courts have shown reluctance to prosecute jurors who have not complied with instructions because they are genuinely trying to do their best. It is clear that preventing further incidents of misconduct is better than punishing jurors after the fact. The report recommended specific “don’t research” directions that address social media and the consequences of jurors doing their own research, as well as the development and use of guidelines most likely to be taken seriously, and training once the jury is selected.<sup>28</sup>

Assistant Professor Lorana Bartels at the School of Law and Justice in Canberra has also done research that suggests making it easier for jurors to notify courts of other jurors’ use of social media and the internet, and requiring jurors to sign a document agreeing to not use social media or discuss the trial because jurors may remember and take instructions more seriously if they are in writing and they promise to uphold them.<sup>29</sup>

Heeding these recommendations may be well advised, in particular the implementation of clear guidelines and training once the jury is selected, as research conducted by the UCL Jury Project at the University College of London’s Faculty of Law found that 23 percent of jurors are confused about what they are and are not allowed to do online. The study also found that two-thirds of jurors did not know of any previous prosecutions of jurors for misuse of social media and the internet.<sup>30</sup>

---

<sup>26</sup> Argast, *supra* note 25.

<sup>27</sup> Bowcott, *supra* note 5.

<sup>28</sup> Assistant Professor Lorana Bartels, “Jurors and Social Media: Is There a Solution?”, *The Conversation* (July 30, 2013) online: <http://theconversation.com/jurors-and-social-media-is-there-a-solution-15921>

<sup>29</sup> *Ibid.*

<sup>30</sup> “Social Media and Juries: An Uneasy Combination”, *Future Lawyers Network, The University of Law (UK)*, (August 6, 2013) online: <http://www.law.ac.uk/futurelawyers/social-media-and-juries/>



## Lawyers Use of Technology for Jury Investigations

Jurors are not the only people that are using technology in relation to court cases. There has been some discussion of the way that lawyers could use technology to assess potential jurors. This is clearly a larger issue in the United States than in Canada because of the volume of jury trials and their jury selection process, but there are concerns in Canada as well, especially as it relates to privacy concerns of individual jurors.

In the past, the only information that a lawyer received on a potential juror was their name and address on the jurors list. During jury selection, the potential jurors were then asked their occupation in court, but that was essentially the end of the inquiry.

Now, it is just as easy for a lawyer to go and look at the online information relating to jurors as it is for the jurors to look at the online information relating to the parties or the lawyers. There are likely many ways that lawyers can gain information on potential jurors prior to trial, through technology and data collection. This process, however, may be rife with ethical and professional conduct issues.

### BC Code of Professional Conduct

Section 5.5 of the BC Code of Professional Conduct (the “Code”)<sup>31</sup> deals with lawyers’ relations with jurors. Section 5.5-1 states:

*When acting as an advocate before the trial of a case, a lawyer must not communicate with or cause another to communicate with anyone that the lawyers knows to be a member of the jury panel for that trial.*

The Commentary for Section 5.5-1[1] of the Code states:

*A lawyer may investigate a prospective juror to ascertain any basis for challenge, provided that the lawyer does not directly or indirectly communicate with the prospective juror or with any member of the prospective juror’s family. But a lawyer should not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror.*<sup>32</sup>

Based on the Code, it appears that a lawyer may investigate a juror or potential juror, but cannot communicate with them clearly some aspects of investigating a juror may be opened up by technology, however, it does not mean there are no constraints. For example, a lawyer may be able to view a prospective juror’s Facebook page, but could not request to be the

---

<sup>31</sup> The Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, January 1, 2013, page 68, online: [https://www.lawsociety.bc.ca/docs/publications/mm/BC-Code\\_2015-03.pdf](https://www.lawsociety.bc.ca/docs/publications/mm/BC-Code_2015-03.pdf).

<sup>32</sup> *Ibid.*

juror's, or a family member of the juror's, friend in order to view the juror's private page. It is likely that the friend request would be considered 'communicating' with the juror. This is also likely true of websites LinkedIn, where even a simple profile view sends a notification to the user that their profile has been viewed and by whom. This interpretation would be consistent with that of the American Bar Association. The American Bar Association Standing Committee on Ethics and Professional Responsibility issued a formal opinion that passive review of online information is acceptable, but active review where there is a "friend request" or even passive review where the juror receives a notification that their site has been viewed, is considered improper conduct and is not permissible.<sup>33</sup>

Technology and social media sites may open up some avenues for lawyers to investigate potential jurors, but lawyers are still governed by the Code and will continue to have to be cautious in the methods they use to investigate jurors so as not to be in violation of their professional obligations. If in doubt, the individual lawyer should contact a Law Society Practice Advisor for further guidance.

This issue will likely have a myriad of examples which does not fit neatly into the Professional Conduct Handbook. For example, what if a juror and a lawyer or party is already connected via social media? Some people have thousands of LinkedIn connections, or Facebook friends. It is not beyond the realm of possibility that those connections may already exist, and if they do, should the juror be dismissed, simply for being a LinkedIn contact of a party or lawyer?

Another example may be if lawyers are aware that jurors are potentially looking them up on firm websites, they could begin to actively post information that is supportive of their position (relevant case law, general blog posts, etc.) on the firm website. Is this communication with a juror?

These examples highlight emerging concerns with the fairness of a jury trial in the age of technology.

## **Conclusion**

The viability of jury trials remains in question. So far, it appears the increased access to information and use of social media has negatively impacted juries and resulted in numerous mistrials and overturned verdicts. It appears that courts in all jurisdictions will have to closely consider the impact of technology on jurors, and continue to develop strategies to manage those impacts. This sentiment was aptly set out by law professors Keyzer and Johnston in their Supreme Court of Victoria (Australia) blog:

---

<sup>33</sup> "ABA Issues Guidance to Lawyers on Internet Searches of Jurors, Potential Jurors", *American Bar Association*, (April 24, 2014) online: [http://www.americanbar.org/news/abanews/aba-news-archives/2014/04/aba\\_issues\\_guidance.html](http://www.americanbar.org/news/abanews/aba-news-archives/2014/04/aba_issues_guidance.html).

*“The costs associated with failed trials, delays and by witnesses, who may be unwilling or even unable, to give evidence again, is significant. This combined with the damage social media can inflict on the right to a fair trial, means that courts and legislatures need to maintain the search for solutions so that the institution of trial by jury can be preserved in a time of unprecedented communication and social change.”<sup>34</sup>*

---

<sup>34</sup> Keyzer & Johnston, *supra* note 4.