But *Gasser* also implies an answer to a different question: may a court restrain by injunction proceedings in another Member State which infringe a jurisdiction agreement? The Court of Justice recently held that proceedings in other Member States can never be restrained, in Case C-159/02 *Turner* v. *Grovit*. But *Gasser* foreshadows that decision. Superficially the issue in *Gasser* looks distinct. Where antisuit relief is sought to enforce a jurisdiction agreement, Article 27 is irrelevant. Substantive proceedings elsewhere do not involve the same "cause of action", as Article 27 requires. But, even if an injunction remains available, *Gasser* now prevents the second court from entertaining substantive proceedings. So in a practical sense *Gasser* makes such relief pointless. Again, the restraint of foreign proceedings is designed to prevent injustice to the defendant in foreign proceedings, even if access to jurisdiction asserted by the foreign court is thereby prevented. But, if such jurisdiction derives from the European jurisdiction regime, *Gasser* implies that it must be respected whatever the prejudice to a defendant. Certainly (like *Turner*), it suggests that strict adherence to the European regime must be prized above broader considerations of procedural justice.

RICHARD FENTIMAN

JURIES: THE FREEDOM TO ACT IRRESPONSIBLY

IF the jury that convicted you behaved improperly—reaching its verdict by spinning a coin, for example, or basing it not on the evidence but on the colour of your face—can you appeal? The answer, you might think, is "Yes, of course!" (see this commentator's notes on *Young* [1995] C.L.J. 519 and on *Quereshi* [2002] C.L.J. 291). In *R.* v. *Mirza* [2004] 2 W.L.R. 201, however, a majority of the House of Lords has ruled that investigating alleged misbehaviour of this sort would break the secrecy of the jury-room, a value it is essential to maintain: so the defendant, if convicted wrongly in these circumstances, must put up with it.

The most convincing argument in favour of this position is that, if the jury are to do their job properly, they must know that they are completely free to speak their minds, which they would not be if their remarks could be the subject of public scrutiny by the legal system afterwards (or harassing enquiries by defendants or the lawyers as a preliminary step). It seems to have been this that convinced the majority; but in course of being convinced by it, they threw in some unconvincing arguments for good measure.

https://doi.org/10.1017/S0008197304396583 Published online by Cambridge University Press

Thus the speeches of the majority also make mention of the need for finality (which if taken to extremes would justify the abolition of all criminal appeals); the risk that such allegations might be manufactured (which surely does not justify ignoring them where they are demonstrably true); the fact that jury misbehaviour is rare (which means, apparently that it can be discounted, like other rare events: explosions at nuclear power-stations, for example, and crashing jumbo-jets!); that acquittals of the guilty are as serious as convictions of the innocent (wrong!), which means that allegations of jury misbehaviour would have to be investigated at the behest of disappointed prosecutors too (and so they should be—even if perverse acquittals are not as bad as perverse convictions!); and by the fact that the public has faith in juries (as its mediaeval predecessors had, of course, in trial by battle, compurgation and ordeals).

Lord Steyn delivered a powerful dissent. The argument that "the residual possibility of a miscarriage of justice is the necessary price for the preservation and protection of the jury system" he found both morally unacceptable, and contrary to the European Convention on Human Rights.

> In my view it would be an astonishing thing for the ECHR to hold, when the point directly arises before it, that a miscarriage of justice may be ignored in the interests of the general efficiency of the jury system. The terms of article 6(1) of the European Convention, the rights revolution, and 50 years of development of human rights law and practice, would suggest that such a view would be utterly indefensible.

But even if the argument were morally acceptable, he thought that it was false.

> The effect of the ruling of the majority will in the long run damage the jury system. Leaving aside the jury, we have reached a position where it is recognised that all actors in the criminal justice system, and notably the judge, prosecuting counsel, defence counsel, police, expert witnesses, as well as lay witnesses, can be the cause of miscarriages of justice. But the consequence of the ruling of the majority is that a major actor, the jury, is immune from such scrutiny on the basis that such immunity is a price worth paying. This restrictive view will gnaw at public confidence in juries. It is a system likely in the long run to increase pressure for reducing the scope of trial by jury. A system which forfeits its moral authority is not likely to survive intact. The question will be whether such a system provides a better quality of justice than trial by professionals.

The majority had the grace to feel uncomfortable with the more startling implications of the uncompromising rule they had laid

https://doi.org/10.1017/S0008197304396583 Published online by Cambridge University Press

down, and some sought to mitigate the worst of them. So building on a concession by the Crown that an appeal would lie if a jury in a murder case used a ouija-board to ask the spirit of the murder victim how he really died (cf. the facts of *Young* [1995] Q.B. 324), Lord Hope suggested that an appeal might perhaps also lie if the jury reached their verdict on the toss of a coin.

Lord Hope also proposed an extra safeguard that he thought would solve the problem, if there is one: in future, judges should tell jurors that "they are under a duty to inform the court at once of any irregularity which occurs while they are deliberating". This proposal has now been acted on (see the Practice Direction, [2004] 1 W.L.R. 665). But how this will help if all the jurors are involved in the irregularity has yet to be explained; and similarly, how it will prevent miscarriages of justice where those who are not involved in the irregularity are too timid to complain at the time.

What underlies the decision of the majority is the practical difficulty of establishing what actually happened in the jury room when an allegation of misbehaviour is made, perhaps a long time afterwards.

This problem is a real one, but I believe there is a simple way of solving it. The discussion of the jury should be tape-recorded. If this were done, then when an allegation of improper conduct is made, it would be a relatively simple matter to check whether it is founded.

Before this idea is rejected out of hand as likely to inhibit the discussion, we should remember that the same objection was made, a quarter of a century ago, to tape-recording police interviews with suspects, a practice that is now routine, and universally accepted. That tape-recording inhibits the police is undoubted: it inhibits them from threatening and bribing suspects, and inventing confessions they never made. If it inhibited juries from using ouija-boards, tossing coins and expressing racial hatred, so much the better.

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https://doi.org/10.1017/S0008197304396583 Published online by Cambridge University Press