

Do They Understand? English Trials Heard by Chinese Jurors in the Hong Kong Courtroom

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Abstract. *Trial by jury is a key institution in the common law system. The introduction of lay persons into the judicial process, however, gives cause for concern about jurors' comprehension of legal language. Studies conducted in America reveal that many jurors are unable to fully understand pattern jury instructions due to the linguistic features typical of legalese, which to some sounds like a foreign language. Now, what if these instructions and legal speeches are uttered in a language that is non-native to the jurors? This is common scenario in the Hong Kong courtroom, where trials conducted in English are typically heard by Chinese jurors. Until now, only one survey conducted in the early 1990s has shed light on this issue. Drawing on the recordings of two jury trials from the High Court, and one Appellate Court judgment quashing a jury verdict, the present study provides further empirical evidence supporting claims about jurors' comprehension problem. Failure to address this problem jeopardises not just the administration of justice, but the very survival of the jury system in Hong Kong. This paper proposes ways to improve jurors' access to legal speeches in particular and the entire trial in general in order to help them return a more soundly based verdict.*

Keywords: *Legalese, foreign language, jury comprehension, court interpreting, bilingual courtroom.*

Resumo. *Os julgamentos por tribunal de júri são uma instituição crucial no sistema de "common law". Contudo, a inclusão de leigos no processo judicial suscita algumas preocupações relativamente à compreensão da linguagem jurídica pelos jurados. Estudos realizados nos Estados Unidos mostram que muitos jurados não são capazes de compreender na íntegra as instruções de júri padronizadas devido a características linguísticas típicas do juridiquês, que, para muita gente, se assemelha a uma língua estrangeira. A questão que se coloca é: e se estas instruções e estes textos jurídicos forem enunciados numa língua diferente da língua materna dos jurados? Esta é uma situação comum nos tribunais de Hong Kong, onde os julgamentos realizados em inglês são, normalmente, ouvidos por jurados chineses. Até ao momento, apenas um inquérito realizado no início dos anos 90 abordou esta questão. Baseando-se nas gravações de dois tribunais de júri do*

Supremo Tribunal e de um julgamento de um tribunal de recurso que procurou reverter o veredicto de um júri, o presente estudo fornece provas empíricas adicionais que sustentam os argumentos relativos ao problema de compreensão dos jurados. A não resolução deste problema coloca em causa, não só a administração da justiça, mas também a própria sobrevivência do sistema de júri de Hong Kong. Este artigo propõe formas de melhorar o acesso dos jurados a discursos jurídicos, em particular, e ao julgamento integral, em geral, de modo a ajudar a proporcionar um veredicto mais sólido.

Palavras-chave: *Juridiquês, língua estrangeira, compreensão do júri, interpretação jurídica, tribunal bilingue.*

Introduction

The jury system, under which defendants are tried by their fellow members of the community, is an integral part of the common law legal system. The institution of trial by jury is enshrined in Chapter 39 of the Magna Carta (The Great Charter), which states that no free man shall be punished except by the lawful judgment of his peers (Magna Carta, 1215). Since jurors are drawn from the community at random to be “judges of fact” and jurors make decisions as a group, their decisions are believed to be broadly representative of different sectors of the community, which can avoid the potential bias in a decision produced by a single judge.

Concern about jury comprehension

The functioning of the jury system is based on the presumption that jurors understand and follow the legal instructions given by the judge, and apply them correctly to the evidence adduced during the proceedings. However, a defendant’s right to a trial by his/her peers has little meaning if these “peers” do not understand the law that governs their decisions (Tiersma, 2009). The introduction of lay people into the judicial system as “judges of fact” gives cause for concern about these lay people’s comprehension of the legal language used in court. This concern stems firstly from the nature of legal language, understandably because legal language has its origins in old English, French and Latin (Mellinkoff, 1963; Tiersma, 1999, 2008, 2010). Apparently legal language is intended for lawyers, not for ordinary lay people. The strategic use of language by lawyers in court is another reason for concern. The late Professor Peter Tiersma, who was both a linguist and a law professor, made very perceptive remarks about the use of language by lawyers as he notes, “[o]ne of the great paradoxes about the legal profession is that lawyers are, on the one hand, among the most eloquent users of the English language while, on the other, they are perhaps its most notorious abusers” (Tiersma, nd). He points out that lawyers have developed some linguistic quirks or aspects of legal style that serve little communicative function besides marking them as members of the legal fraternity (Tiersma, 1999: 69). In his ethnographic study of spoken language in the courthouse of North Carolina in the United States, O’Barr (1982: 26) observes that many jury instructions are “mumbo jumbo” to even well-educated Americans. Indeed, the nature of legalese and the strategic use of language in court make jurors’ access to the judicial process, especially to counsels’ speeches and court instructions, highly dubious. This gives cause for concern as any comprehension problems matter considerably to the administration of justice and may even result in a miscarriage of justice. Indeed, in

capital cases, jurors' comprehension of the instructions is literally a matter of life and death.

Studies of juror comprehension in the United States

The juror comprehension problem has been researched almost exclusively in the US context since the Contempt of Court Act 1981 in England prohibits post-trial interviews with jurors or publication of any matter relating to the deliberation process (Duff *et al.*, 1992; Heffer, 2005). A pioneering study conducted by Charrow and Charrow (1979) investigated the comprehensibility of civil jury instructions from California. Their study shows that half of the prospective jurors in their experiment had problems understanding the pattern instructions. The study also identified a number of linguistic features typical of jury instructions as impeding jurors' comprehension. Such legalistic features include the use of "as to" in lieu of "about", "overuse of nominalisations", avoidance of modal verbs such as "must" and "should", "technical or legal lexical items", "use of double or triple negatives", "use of passives", "poor discourse structures" and "too many embeddings". The study also shows that a rewriting of the instructions using plain English led to a significant improvement in the subjects' understanding of the instructions. A later study using a similar methodology by Steele and Thornburg (1988) yielded more or less the same results. The juror comprehension problem has been addressed in later studies such as Dumas (2000), O'Barr (1982) and Tiersma (1993, 1999, 2009), which ultimately led to the rewriting of the pattern jury instructions in some of the states to improve their comprehensibility.

Ritter's (2004) study reviews a number of appellate courts' decisions in the United States and finds that the courts in general cling to the presumption that the jury understands and follows instructions. She argues that this presumption is built on nothing but the courts' subscription to the notion that the questioning of the validity of this presumption poses a threat to the survival of the whole justice system. For this reason, appellate courts are generally unreceptive to claims that the jury instructions are incomprehensible (Ritter, 2004: 163). Ritter argues that this presumption is ill founded and contends that "even the best-intentioned juror, desirous of fulfilling his or her oath, has little control over his/her ability to comprehend legalistic instructions" (2004: 197). Indeed, to lay persons, these legalistic instructions, as Frank puts it, "might as well be spoken in a foreign language" (1930: 195).

Now, what if indeed these words are uttered in what actually is a foreign language of the jurors? This happens to be the common scenario of the Hong Kong courtroom, where Chinese jurors sit in a trial conducted in English.

The present study

In the light of the findings of the US research on the juror comprehension problem, this study aims to investigate the problem in the courts in Hong Kong, a common law jurisdiction inherited from England. In the case of Hong Kong, the juror comprehension problem is understandably an even bigger issue, given the overwhelming Cantonese-speaking local population, which accounts for about 90% of the community (Census and Statistics Department, 2012). It follows that those serving in juries nowadays are mostly Cantonese-speaking with a bilingual knowledge of English. What faces these jurors then is not just the legal language, but the English language per se, which most of them speak only as a second or more frequently a foreign language. In other words, the

comprehension problem for jurors in the Hong Kong courtroom is much more than just the standard intra-lingual legal-lay communication problem, rather it is an inter-lingual communication gap between English-speaking legal professionals and jurors who are both lay participants and non-native-English speakers in the courtroom.

This paper seeks to complement the findings of an earlier survey study of the juries in Hong Kong. It draws on the court proceedings of two authentic jury trials from the Court of First Instance (CFI) of the High Court, and a judgment of the Court of Appeal (CA) quashing a jury verdict. The CA judgment expresses skepticism about the jury's comprehension of the lower court's instructions. Permission to access the recordings of the two jury trials was obtained from the High Court for academic purposes¹, while the CA judgment was downloaded from the website of the Judiciary of Hong Kong². This paper demonstrates using authentic data that there is a genuine problem for jurors in Hong Kong to access not only the law and the legal language, but also some of the evidence presented during the court proceedings. It also discusses how the problems identified could be resolved. Ultimately, it is hoped that the findings of this study will alert the judiciary and the legal profession to the jury comprehension problem and to the solutions proposed.

The jury system in Hong Kong

The jury system was introduced to Hong Kong in 1845 (Duff *et al.*, 1992), soon after Hong Kong became a British colony, and is used in all criminal trials in the CFI of the High Court and in a few civil cases such as false imprisonment and defamation. To qualify as a juror, one must be a Hong Kong resident of good character, aged 21 or above but below 65, and not suffering from any physical disabilities such as blindness or deafness. A juror must also have "a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings" (Jury Ordinance, 1999). Criminal trials in the CFI were conducted solely in English until 27 June 1997 when the first criminal trial was conducted in Chinese (Cantonese). Thereafter, the court can hear a trial in either English or Chinese as it sees fit (Provisional Legislative Council, 1997). However, as of 31 December 2014, 75% of the criminal trials in the CFI were still being conducted in English (Department of Justice, 2015). Jurors' English proficiency is therefore essential even to this day.

Because of the use of English in court and the requirement for jurors to possess a sufficient knowledge of the language in which trials are conducted, there has been a tendency for juries to consist of expatriate residents and well-educated middle class and professional people (Duff *et al.*, 1992: 22), especially in the early colonial days. Therefore, one of the criticisms levelled against the jury system of Hong Kong is its lack of randomness and representativeness of the community it purportedly serves (Chan, 1997; Duff *et al.*, 1992). For example, there were only 119 jurors on the jurors list of 1854 (Hong Kong Government, (1854, February 25. Jury List, 1854), 1854, February 25), representing only 0.2% of the total population of around 60,000 people then (Munn, 2001), and all of them were expatriate residents of Hong Kong. They certainly did not represent the predominantly-Chinese speaking community and could not be considered "peers" of the defendant. They were chosen obviously because of their proficiency in the English language. And those few Chinese who were included on the lists in later years were understandably people from the upper echelon of society, who were usually well educated professionals proficient in English.

Due to the difficulty in securing eligible persons to serve as jurors, obviously because of the English language requirement, unlike in England and in the United States, the jury in Hong Kong started with only 6 members and was later increased to 7 in 1864 and from 1986, the number of jurors in a jury can be increased to 9 in complex cases (Duff *et al.*, 1992). A valid verdict is either a unanimous or a majority verdict of 5 to 2 or 6 to 1 in a 7-member jury.

With the widening of the jury pool, which now represents roughly 10% of the total population (Legislative Council Panel on Administration of Justice and Legal Services. (2015, June 22), 2015, June 22), one is concerned less about the jury's randomness and representativeness of the community, but more about jurors' ability to hear trials conducted in English, which remain dominant in the CFI to this day as was noted above. Despite the requirement for jurors to have a sufficient knowledge of the trial language, the legislation is silent as to how that linguistic competence is to be measured, but the administrative practice has been to include in the jury pool only those with at least an educational attainment of Form 7, or its equivalent (Law Reform Commission of Hong Kong, Juries Sub-committee, 2008; Law Reform Commission of Hong Kong, 2010). As a matter of fact, many jurors selected for jury service put up a variety of reasons to get exempted from the service, with "poor English" being an oft-cited reason, which however is often regarded by the court as a mere excuse for exemption. Therefore, some judges, as will be demonstrated by my data, try to talk prospective jurors into accepting the service, for example, by telling them that the proceedings will be bilingual and that they have a chance to hear everything in two languages. That however is not in fact the case. This misconception about bilingual proceedings is obviously due to the obligatory presence of an interpreter in almost all trials conducted in English. The section below will explain why and how interpretation services are provided in proceedings conducted in English.

Interpretation in the Hong Kong Courtroom

Hong Kong has always been a predominantly Cantonese-speaking community. The census statistics for the years 2006 and 2011 show that about 90% of the population spoke Cantonese as their usual language; only about 3 to 4% of the local residents spoke English in their daily life, although about 40% of them claimed to speak English as another language (Census and Statistics Department, 2012). Therefore, over 90% of the litigants appearing in court as witnesses or defendants speak Cantonese as their first language (or as a *lingua franca*) and choose to testify in Cantonese, whether the proceedings are conducted in English or in Cantonese. In the former case, interpretation services cannot be dispensed with. Note that however interpretation in the Hong Kong courtroom is provided to cater for the needs of the Cantonese-speaking witnesses and defendants and not for those of the jurors, who are selected for jury service because they are supposed to have an adequate knowledge of the English language. Although jurors with a comprehension problem may benefit from the interpretation provided in open court, not all the interpretation provided is actually accessible to everybody in the courtroom because of the different modes of interpretation used and the need for the interpreter to shift from one mode to another throughout the trial. This will now be explained.

The usual mode of interpretation used for communication between judges/counsel and defendants/witnesses is *consecutive* interpretation (CI). In the consecutive mode, the source language (SL) speaker and the interpreter take turns to speak with the SL speaker

pausing at regular intervals to allow his/her utterance to be interpreted, and the interpretation is done in open court and is thus heard (though it may or may not be understood) by all those present in the courtroom. CI is mainly used in witness-examination, which involves the interaction between English-speaking counsel and Cantonese-speaking witnesses. Jurors having a problem with their understanding of a question asked in English may benefit from the Cantonese interpretation, albeit intended for the Cantonese-speaking witness in the witness box (and the defendant in the dock). For interactions between the judge and counsel, and monologues such as counsel's opening/closing speeches and the judge's instructions to the jury, whispered simultaneous interpretation (SI), professionally known as *chuchotage*, is commonly adopted. In *chuchotage*, the interpreter whispers simultaneously what is being said by the speaker into the ear of the defendant, but obviously the interpretation is accessible only to the defendant, not to anyone else in courtroom including the jury, who is nonetheless the direct addressee of these monologues.

In the rare cases where a witness, usually an expert witness such as a medical doctor, chooses to testify in English, no interpretation in the consecutive mode will be provided as the witness examination process itself does not require the mediation of an interpreter. However, *chuchotage* will be provided for the Cantonese-speaking defendant in the dock, but this, however, as explained above is not accessible to the jury members. Therefore, jurors who do not have a sufficient knowledge of English may have a serious problem accessing the expert evidence, often technical in nature. The rest of this paper will illustrate the Hong Kong juror comprehension problem.

The survey study by Duff *et al.* (1992)

In the late 1980's, Duff and his team carried out a jury project, to find out the extent to which jurors in Hong Kong understand the trial process, by means of a survey which invited people having served as jurors to report their jury experiences. The respondents were asked to fill out questionnaires and to send the completed questionnaire back to the researchers.

Background information about the respondents

Altogether 58 respondents with jury experience completed and returned their questionnaires. 80% of the respondents reported that they preferred to speak Cantonese at home and 27% of them answered in the negative the question "If you were to read an English newspaper, would you fully understand the content of it"; while 65% of them indicated that they were not able to understand an English television news broadcast (Duff *et al.*, 1992: 22).

Findings about their comprehension of the court proceedings

One third of the respondents admitted to experiencing varying degrees of difficulty in comprehending the evidence, the legal terminology and the language of the court. One of the respondents admitted, "I am quite innocent about the procedure, and my English standard is too poor to be a juror" (Duff *et al.*, 1992: 105). The written responses by some of the jurors indicate serious problems of their ability to express themselves in English. The following are two examples (Duff *et al.*, 1992: 70):

The nature may involve many legal points. I cannot sure that I understand fully.

It is because we had only keep waiting at the jury rooms for that three days and eventually jurors were dismissed due to the insufficient evidently.

One of the respondents was an expatriate and made the following comment:

I am a native English speaker. I could not hold a simple English conversation with two of my fellow jurors. How much of the proceedings did they understand?
(Duff *et al.*, 1992: 70)

Jurors may feel too embarrassed or intimidated to flag up a comprehension problem as expressed by one of the respondents in his/her comments below:

The whole atmosphere prevented anyone raised questions. You'll make yourself a fool in front of everybody. If you spoke in Chinese, the question will be translated. You'll feel more stupid.
(Duff *et al.*, 1992: 74)

The respondents' self-evaluation and the way in which the questionnaires were completed led the researchers to the conclusion that a "significant proportion of jurors have some difficulty in understanding the English language" (Duff *et al.*, 1992: 84) and may not have a sufficient knowledge of English "to understand the evidence of witnesses, the addresses of counsel and the judge's summing-up" (Duff *et al.*, 1992: 22).

Comprehension and verdicts

It is interesting, if not disturbing, to note that many of the jurors who expressed problems with their comprehension of the proceedings convicted the accused. Apparently they did not follow (or otherwise understand) the court's instructions about the benefit of doubt, which should go to the defendant. Despite the fact that they were not sure of what they had heard, they went on to convict rather than acquit the defendant. This is probably why, while in many other common law jurisdictions, jury trials tend to result in a lower conviction rate, in Hong Kong, the conviction rate of jury trials in the CFI has always been slightly higher than in bench trials in the District Court and magistracies where judges sit alone (Department of Justice, 2013; Duff *et al.*, 1992).

Suggestions from respondents

The respondents also made some suggestions for improving their comprehension, which *inter alia* include providing the jury with a precis of the judge's summing-up, getting an interpreter to interpret it for the jury, or else conducting the trial in Cantonese. This can also be regarded as evidence of the respondents' difficulty in accessing the trial talk in English without the help of the interpreter.

The following section presents some observations from the court data to support the findings of Duff *et al.*'s (1992) study and the concern about juror comprehension in the Hong Kong courtroom.

Observations from the authentic court proceedings

The two jury trials consist of one murder and one rape case, both conducted in 2007, each of which has a jury of seven members. With the exception of one juror in the murder trial, who appears to be Indian or Pakistani, judging from his name and his accent when he was heard taking the oath, all the other jurors have Chinese names and a typical Cantonese accent.

Request for exemption from jury service for reason of poor English

As was noted in Section 3 above, many prospective jurors selected for the service cite “poor English” as a reason for exemption. This happens also in the rape trial, as shown in Example 1 below (for the transcription symbols used in this paper see the Appendix).

Example 1: Prospective Juror addressing Judge through Interpreter, rape case (JR=juror J=judge; I=Interpreter)

Turn	Speaker	Utterances
1.	JR	<through Interpreter> Your Lordship, because I am a Chinese em language teacher. All along I have been em using (.) em Chinese as er teaching medium, and very seldom using em English. Now I’m worried that during the whole process, em (.) I will not understand some of the questions
2.	R	(1) Well, you will hear them in both languages , Madam
3.	I	<Interpretation in Cantonese in open court>
4.	JR	<through Interpreter> In that case, I am willing to accept that.
5.	J	And er, I will be summing up at the end of it. But er, (.) that summing up will also be (.) interpreted. So, you have a chance to hear it in both languages again.

In the above example, a prospective juror whose name has just been drawn from the ballot box is asking the judge in Cantonese for an exemption from serving on the jury because of her English inadequacy. The judge however succeeds in persuading her to accept the service by reassuring her that the trial would be bilingual with the assistance of an interpreter. The judge is right in so far as interpretation of testimony provided in the consecutive mode is concerned. As was noted above, testimony given in English and interactions between the court personnel throughout the trial, including jury instructions and the judge’s summing-up are nonetheless interpreted in *chuchotage* audible only to the defendant and the interpretation is inaccessible to jurors. Apparently the judge is telling only part of the truth, certainly not the whole truth.

Witnesses testifying in English

As was noted above, not all the witnesses have to testify through an interpreter. In some cases, albeit rare, a witness may choose to testify in English without the mediation of an interpreter. Those who choose to give evidence in English are either expatriates with English as their native language, or English and Cantonese bilingual locals. The latter are usually expert witnesses, who might find it more prestigious to testify in English or because they might otherwise suffer a loss of face if, in their position as expert witnesses, they have to rely on the interpreter for interaction with the legal professionals.

For example, the murder case involves four expert witnesses, three medical doctors giving evidence about the medical treatment provided to the victim before his death, and one forensic pathologist explaining the post-mortem report of the deceased. All of them were local professionals, obviously with Cantonese as their first language. Two of the medical doctors and the forensic pathologist testified in English without the assistance

of the interpreter, who nonetheless had to assist the Cantonese-speaking defendant in the dock by providing him with *chuchotage*, which however was not accessible to the jury or any other persons in the court requiring interpreting services.

In fact, the two medical doctors testifying in English, one being a senior and the other a junior medical officer, displayed immense difficulties in their communication with counsel, both in understanding counsel's questions and in expressing their replies in English. Example 2 is one of the many:

Example 2: Cross-examination of the junior medical doctor, murder case (DC=defence counsel; Dr=doctor)

Turn	Speaker	Utterances
1.	DC	[Well, if your suturing is very effective, and that would then build up a pressure on the brain. The pressure would be excessive on the brain instead of escaping through the suture.
2.	Dr	(2.5) I'm sorry? Can you:: repeat?
3.	DC	If your suturing is highly effective, one hundred percent effective, but nevertheless below it, some further bleeding or pressure develops, if it can't es-- if that pressure can't escape through the suture holes, the pressure would be applied to the brain.
4.	Dr	(2) Mmm. (1) A::nd (2) actually we er:: (.) actually I-- (.) I er (2) I'm sorry, can you (.) can you--
5.	DC	Well, in this case we hear that, eventually, when the head was opened up at some time after six a.m., the pressure was such that the brain was displaced slightly to one side--
6.	Dr	Yes.
7.	DC	Right? What I'm saying is that er, if there was no drain and the sutures were totally effective, any further development of pressure (.) beneath the sutures would have nowhere to escape.
8.	Dr	(6) Actually the su-- the:: (.) the scalp was sutured in the full thickness, and the:: the-- the-- the bleeding was er (.) er:: (.) was stopped by that, so er:: (.) you mean er (2) and (2.5) and er:: (2) actually I'm-- I'm quite-- I'm not quite understand your question. Can you er (.) er repeat it again?
9.	DC	Well, did you-- (1.5) you now know the sequence of events that led to the death of the accused <sic.: should be "deceased"> by reading the hospital notes, [don't you?
10.	Dr	[Mm hmm. Yes. Yes. Yes.
11.	DC	Right?
12.	Dr	Yes.
13.	DC	And-- and-- it's right, isn't it, that er (.) by the time the surgeon, as it were, got access to the brain, the patient was er (1.5) more or less brain dead, (5) (do) you agree?
14.	Dr	Er:: (.) yes.

15.	DC	Yeah. And so, with the benefit of hindsight, I'm not disputing everybody doing the best they could under these circumstances, but (.) it would have been better, would it not, having regard to what we now know, to have dealt with that subdural haemorrhage, as soon as possible after it was first known (to you)?
16.	Dr	(8) <silence>
17.	DC	Do you agree?
18.	Dr	Erm (.) erm I'm sorry, can you... in=
19.	DC	=Well, the subdural (.) haemorrhage was detected (1) in the first brain scan (.) at about one twenty a.m., right?
20.	Dr	Yes.
21.	DC	But— but nothing was done about it (.) until much later, after it had (.) enlarged
22.	Dr	Mmm.
23.	DC	Right?
24.	Dr	Er—

In this case, the defendant was charged with murder for hacking the head of the victim with a chopper twice, which lacerated the victim's scalp and fractured his skull. The victim died in hospital two days later. In Example 2 above, the defence counsel is cross-examining the junior doctor, who sutured the victim's wounds. He is suggesting to the doctor that it was improper medical treatment or negligence on the part of the hospital or more precisely of the doctors that was to blame for the death of the victim. In particular, the defence counsel is suggesting that the stitching up of the wounds on the deceased's scalp led to excessive pressure on the brain underneath the scalp and aggravated the subdural haemorrhage, which ultimately resulted in the death of the victim. In other words, he is arguing that the chop wounds themselves were not fatal.

The above example shows an evident communication problem between the defence counsel and the doctor, with the latter experiencing immense difficulties in his comprehension of the defence counsel's questions. It has most of the indicators of communication problems as identified by Gibbons (2002), i.e. overt statements of incomprehension (turn 8), responding with apologies (turns 2, 4 and 18), clarification requests (turns 2, 4, 8 and 18) and absent responses (turn 16). The back-channelling (such as "Mmm" in turns 4, 10 and 22), generally understood to be an acknowledgement of comprehension, in this case should rather be viewed as the doctor's tactic to mask his incomprehension in a failed attempt to avoid embarrassment. Similarly, the short response "yes" in turns 6, 12, 14 and 20 may not serve as a direct confirmation to the question asked as would be the case in most other situations, but a short response uttered by the doctor to feign his comprehension.

As was noted above, jurors do not have access to the *chuchotage* provided for the defendant and can only rely on their knowledge of English to access this examination process, in which technical medical knowledge and terminology are involved. Whether they understand the questions asked any better than the doctor himself and the evidence adduced during this process is anybody's guess. However, if professionals like medical doctors, who at the very least hold a bachelor degree in medicine and are thus well qualified for, (albeit under the law exempted from), jury service, experience such

immense difficulties in their communication with counsel in court, would this not pose an even a bigger problem for lay jurors, (non-lawyers and non-doctors in this case), with an average educational level of Form 7?

Jury instructions of the two trials with legalistic features identified – implications for Chinese jurors

Unlike in the United States, there are no pattern jury instructions in Hong Kong, although the Judiciary of Hong Kong does provide judges with Specimen Directions for Jury Trials. These directions are however for reference only and judges are free to refer to them or to improvise their instructions (Cheng *et al.*, 2015). Nevertheless, the jury instructions given at the beginning and towards the end of the two trials are observed to present features identified by Charrow and Charrow (1979) as impeding jury comprehension. Examples 3 and 4 are extracts of jury instructions given at the start of the two trials. For easy reference, the sentences in the two extracts are numbered and their legalistic features are identified in the rightmost column of each table.

Example 3: Extract from jury instructions in the murder case

No.	Utterances	Legalistic features
1.	Now, members of the jury, you’ve been chose as jurors to consider the facts of this case and eventually to return a verdict as to whether this defendant is guilty or not guilty of the offence of murder with which he has been charged .	The use of “as to” and a long sentence with embedding
2.	As judge and jury, it’s our task to try the case together but we have different functions to perform during the trial.	The use of “it’s our task to” to avoid the use of a modal verb “must” or “should”
3.	I act as the referee between the parties to ensure that the trial is conducted fairly and in accordance with the rules of procedure and the evidence	Formal expression – the use of “in accordance with” in lieu of “according to”;
4.	At the end of the trial, I should sum the case up to you and remind you of such parts of the evidence which I think might help you to reach your verdict.	Double embeddings

Example 4: Extract from jury instructions in the rape case

No.	Utterances	Legalistic features
1.	Let me give you a general outline of the (.) procedure that is usually followed in a criminal trial.	the use of embeddings and passives
2.	Seven of you have been selected as the judges of facts in this case, and you are the sole judges of facts .	technical terms
3.	It’s your duty to carefully, calmly and dispassionately consider the evidence that you hear and without the slightest trace of sympathy for or prejudice against any party involved in the trial, so the facts in the case are for you.	The use of “it is your duty” and a long sentence with embeddings and technical words

4.	If I give you any direction or make any ruling during the course of the trial, you are required to accept that ruling.	Avoidance of the use of a modal verb “must” by using “you are required to”
5.	On the other hand, I’m the sole judge of the law.	Technical terms (some students in the interpreting class understood the word “sole” as “soul”)
6.	The system of justice which we practise is adversarial in nature, which means that the presentation and examination of witnesses is substantially in control of counsel for prosecution and counsel for the defence.	A long sentence with embeddings and technical terms such as “adversarial”
7.	Subject to certain rules, which I enforce , you and I as impartial judges sit and listen to what counsel say and what the witnesses have to say when they are giving their evidence	A syntactically complex sentence with embeddings and formal expressions such as “subject to”

Like the pattern jury instructions in the United States, the jury instructions used in these two jury trials present linguistic features similar to those identified by Charrow and Charrow (1979). These linguistic features are likely to cause comprehension difficulties for the jurors in Hong Kong too and the comprehension problem is more likely to be aggravated by the fact that the jurors are non-native speakers of English. The transcriptions of the audio recordings of the court proceedings by my local Chinese research assistants, all fresh graduates with a degree in Translation (and qualified for jury service), indicate that other non-technical aspects of the English language are equally problematic. For example, in her summing-up of the murder trial, at one stage the judge said, referring to the evidence of the eye-witness, “things got a little heated...”. This was transcribed as “Thanks God (a little heat)” with the parenthesised words as possible hearings. The interpretation performance of the final-year Translation students in my Legal Interpreting class reinforces this observation. So, if the low accuracy rate in both the transcription and interpretation of these jury instructions is any indication of their comprehension by the jurors, one can reasonably conclude that most of the jurors would have a problem with their understanding of these particular jury instructions.

Mumbling and fast speech as aggravating factors

For listeners without a native command of the language, it is not just the words uttered by the speaker, but also the manner in which these words are uttered that has a direct bearing on comprehension. In the murder case, the judge speaks very fast and mumbles her words throughout the jury instructions and the summing-up. The transcriber and many students in the Legal Interpreting class had difficulty hearing ordinary, non-technical words including even the first part of sentence 1 in Example 3 – “Now, members of the jury” as these words were not articulated distinctly.

As questions from jurors are not encouraged, at least not in open court during the trial, there is no knowing to what extent those words uttered by the judge were accessible to the jurors. They might feel their face threatened for having to raise a comprehension

problem in court as reported by a respondent in Duff *et al.*'s (1992) study mentioned above. In this murder case, the judge started her long mumbling summing-up in the afternoon of Day 7 of the trial and carried onto the morning of Day 8. It was not until the judge was about to resume her summing-up in the morning of Day 8 that she was informed by the court clerk of the jury's request for her to speak more slowly and louder. The jury members must have had great difficulty in their understanding of the summing-up the day before, but didn't pluck up the courage to interrupt the judge. For the next few minutes or so after the court clerk had whispered the jury's request to her, the judge tended to raise her voice a little and to slow down a bit, but soon after she returned to her old self. Thereafter no more requests were heard from the jury, who might have deemed it too embarrassing or otherwise futile to make any more requests.

Reading of the jury oath/affirmation

Jurors are silent observers and rarely do they have to speak in court. When they do speak, for example to ask for an exemption from jury service, they usually choose to do so in Cantonese and to have their utterances interpreted into English by the court interpreter (as in Example 1). It is therefore not possible to assess their English proficiency from their spoken English. The foreman of the jury elected by his fellow members as their spokesperson is presumably the most competent English speaker of the jury. The only occasion on which all the jurors are heard speaking in English is when they take their jury oath or affirmation in English. The following is the English version of the jury oath/affirmation used in Hong Kong:

I (name) **solemnly, sincerely** and truly **affirm**/swear by **Almighty** God that I will give a true **verdict** in this case **according** to the **evidence**.

The moment a juror takes his/her oath/affirmation is usually a moment of revelation about his/her English proficiency. Most of the jurors in the two jury trials in this study are found to struggle with their pronunciation of the words highlighted with boldface, which obviously do not exist in their vocabulary.

The above observations may serve as evidence from which one can infer jurors' "insufficient knowledge of English". However, unlike in a bench trial, where the judge has to give reasons for the verdict, the jury does not have to justify its decision. It would therefore be difficult to find concrete evidence of a comprehension problem leading to a problematic verdict, simply by observing a trial or reviewing the transcript. For the same reason, it would be equally difficult to appeal against a jury verdict on the grounds of a comprehension problem. Section 7 below presents a rare case where the Court of Appeal of Hong Kong quashed the verdict by a jury and expressed concern over the jury's ability to comprehend the directions given to it by the judge.

Appeal against a jury verdict

In *HKSAR v. Lai She Hung* (2004), the defendant was charged with one count of false imprisonment (count 1) and two counts of rape (counts 2 and 3). It was the prosecution's case that the complainant was forced to stay in the defendant's apartment (subject matter of count 1) and was later raped by the defendant twice (subject matter of counts 2 and 3) in the same apartment on the same day. Following a trial in the CFI before a judge and a jury of seven members, the defendant was acquitted of counts 1 and 2 but was convicted of count 3. The defendant appealed against the conviction based on the following grounds (*Lai She Hung v. HKSAR*, 2005).

Inconsistency of verdicts and CA's response

The complainant gave evidence in the CFI to the effect that the defendant imprisoned her in the apartment despite her pleas to leave and raped her as she hit him and shouted for help. The defendant then chatted to her through the night and later raped her for the second time despite her oral protest. In the Court of Appeal, counsel for the appellant (defendant in CFI) raises inconsistency of verdicts as the first ground of appeal and she argues:

It is difficult, if not impossible, in the circumstances, to follow the jury's reasoning when they disbelieved the complainant in relation to Counts 1 and 2, which formed the gravamen of her complaint, but yet relied on the same witness in relation to Count 3 (*Lai She Hung v. HKSAR*, 2005).

The Court of Appeal accepts this ground and points out at the same time that the CFI judge had done his best by giving fair and clear directions to the jury in his summing-up, as expressed in the following remark:

Our concern about the apparent inconsistency in the verdicts was something which the judge, in a summing up of paramount fairness and clarity, had anticipated and had sought to avoid with the following directions (*Lai She Hung v. HKSAR*, 2005).

The judgment of the Court of Appeal goes on to cite the trial judge's summing-up to support the above observation. The gist of the trial judge's summing-up with regard to the verdicts of the three counts is that in theory it is open to the jury to return different verdicts on the three different counts, but in practice, it may appear to be more reasonable for the jury to find the defendant guilty on all or on none of the charges. Whether this message got across to the jury is however anybody's guess. After all, the judge's directions worded in typical legalese (as shown in Example 5 below) are unlikely to be perceived as "of paramount clarity" by the jurors, but more likely as confusing and perplexing.

Example 5: Extract of judge's summing-up, HKSAR v. Lai She Hung (2004)

All **permutations** are, as a **matter of law**, available to you. You decide in giving these three counts your separate consideration. But you may think – **and again this is entirely a matter for you – that as the case has been presented to you on the issues that are laid before you, and where the central issue in the case is one of consent** – 'Did this lady consent to what happened or did she not? Did she consent to remain in the flat? Did she or did she not consent to have sex with the defendant?' – then, in practice, you may think – **and it is entirely a matter for you** – that these three counts **stand or fall together**; guilty to all or not guilty to all.

Note the use of the formal word "permutations" (with its origin from Latin), the technical expressions "stand or fall together" and the overuse of embeddings (as in lines 2 to 4). All this can be problematic to the understanding of even jurors with English as their native language or at least as a lingua franca as in the case of American jurors, not to mention the predominantly Cantonese-speaking jurors in Hong Kong.

The Jury's confusion over the verdicts

While one can only speculate on the jury's comprehension of these directions, the jury's confusion over the meaning of a majority verdict may provide a glimpse of the jury's English knowledge, which also aggravates the Court of Appeal's concern about the jury's understanding of the directions as it observes:

Whether or not the obvious wisdom of these directions fell on deaf ears because they were not fully comprehended by the jury is difficult to say. ... What seems plain, whatever may have been the reason for it, is that this particular jury had the greatest difficulty in following explicit directions which had been given to them about the nature of majority verdicts, supplemented, as these directions were, by a written form setting out the questions they would be asked at the time they returned their verdicts (*Lai She Hung v. HKSAR*, 2005).

The Court of Appeal is referring to the transcript of the trial in the CFI which records the exchanges of the court clerk, the judge and the jury foreman, interspersed with the remarks of the defence counsel, when the jury was asked to return its verdicts in court. Due to the jury foreman's incomprehension or confusion over the meaning of 'majority verdicts', what would have been a short exchange of a few lines has resulted in a much extended interaction of a transcript of 6 pages. Example 6 below is an extract of the transcript.

Example 6: The Jury asked to return verdicts

- CLERK: May the foreman please stand. On the 1st count of false imprisonment against the accused, Lai She-hung, have you reached your verdict upon which at least five of you have agreed?
- FOREMAN: No.
- COURT: Very well, let's go to the next count. Members of the jury, have you reached a verdict on any count upon which at least ...
- FOREMAN: I'm sorry, maybe I misunderstand ...
- COURT: Yes.
- FOREMAN: ... the question, so ...
- COURT: Have you reached a verdict on the 1st count of false imprisonment upon which at least five of you are agreed?
- FOREMAN: No.

As it turned out, the jury had already reached a not-guilty verdict of 1 to 6 in respect of count 1, despite the fact that the foreman repeatedly told the court that the jury had not reached one upon which at least five of the jurors were agreed. Thinking that the foreman might have a problem with his understanding of the phrase "at least five", the defence counsel at trial interrupted at a later stage to suggest that the court rephrase it to "five or more" and the court did accordingly, which however did not seem to help. The transcript shows that the jury foreman, who, as noted above, is usually the most competent English speaker of the jury, had tremendous difficulties in his comprehension of the meaning of a majority verdict.

Conviction quashed

The inconsistency in the verdicts returned and the jury's confusion over the meaning of majority verdicts, ultimately led to the quashing of the defendant's conviction on count 3 by the Court of Appeal as it observed:

Set against an evidential background where the jury acquitted on the first allegation of rape... this left in our opinion no logical or reasonable basis for a conviction on the later rape... The circumstances in which the verdicts were recorded have only added to our concern about the conviction. Accordingly, we have concluded that the conviction on count 3 is unsafe and cannot be permitted to stand (*Lai She Hung v. HKSAR*, 2005)

Although the Court of Appeal does not directly spell out a comprehension problem as contributory to the inconsistent and illogical verdicts, the inference one is tempted to draw from the CA's judgment and the jury foreman's confusion over the verdicts is that this particular jury did not possess the required language proficiency to be able to understand the proceedings in English.

Discussion

Notwithstanding the requirement for jurors to have sufficient knowledge of the English language, empirical studies show that jury comprehension of the court proceedings cannot be taken for granted. As has been demonstrated by the study of Duff *et al.* (1992) and my own data, despite the ubiquity of interpreters in all English-medium trials, the Hong Kong courtroom is not fully bilingual for the jurors, nor for some of the other non-English-speaking participants in court (Ng, 2015), because the interpreting service is actually provided with the primary interest of the defendant in mind. The need for the lone interpreter to shift from the consecutive mode to *chochutage* during the course of interpreting as the situation arises inevitably denies jurors without an adequate command of English full access to the trial talk. This includes evidence given in English, counsel's opening and closing addresses and the judges' summing up and jury instructions. The subsections below present some suggestions for improving jurors' access to the trial proceedings.

Make the courtroom fully bilingual with team interpreting and the use of SI equipment

As was noted above, an interpreter in the Hong Kong courtroom often works alone and has to alternate between the open court consecutive mode and the more restrictive *chochutage* mode, and the use of *chochutage* necessarily denies the jury access to the interpretation. A solution to this would be to arrange for two interpreters to work in all trials conducted in English: one interpreter would provide CI in open court for interaction between English-speaking legal professionals and Cantonese-speaking lay participants, while the other interpreter would provide Simultaneous Interpretation (SI) of the English utterances produced by the legal professionals, but not interpreted consecutively in open court. SI equipment would also be used so that the interpretation would be available to all those requiring the service. This way, not only the jury, but also spectators in the public gallery requiring interpretation services would also be able to access all unmediated utterances produced in English through a pair of headphones. As was mentioned above, these English utterances, not mediated by the court interpreter in open court, include evidence given in English, jury instructions and speeches by counsel. This may also include interactions between the judge and counsel in the course of witness examination, often resulting from the judge's intervention and leading to omissions in interpretation (Ng, 2015). With the provision of interpretation services for the jury, the language requirement or the educational level for prospective jurors could be lowered

to broaden the jury pool and thus to improve its randomness and representativeness of the community.

Allow the interpreter time for preparation

Providing jurors with interpretation services would not guarantee their full access to the court proceedings unless the quality of the interpretation is also guaranteed. In order to ensure quality in interpretation, it is essential to allow the interpreter sufficient time to prepare for the case at trial, a suggestion also made by some of the respondents in Duff *et al.*'s (1992) study. It is therefore important for court personnel to acknowledge the interpreter as part of their professional team who, like them, needs to prepare for the trial in order to do his/her job properly. As Gamal (2014: 65) points out, it is "unrealistic to expect an interpreter to walk into a courtroom without any knowledge of the topic, terminology or chronology of the case and still be able to perform efficiently". Counsel do not go to court unprepared and witnesses must all have familiarized themselves with their own statements before testifying in court. It is not only fair but also sensible to allow the interpreter access to the case files and time to prepare for the case in advance. The current situation indicates a basic lack of understanding on the part of the legal professionals about the nature and the process of interpreting.

Counsel and judges to mind their language and the way they utter it

As has been illustrated above, both the nature of legal English and lawyers' strategic use of language contribute to the incomprehensibility of much of what is said in the courtroom. My data also reveal that it is not just the words used by counsel/judges that cause comprehension problems to jurors (and other listeners), but also the way in which those words are uttered directly impacts on the comprehension of the listeners. In particular, it poses a big problem for those without a native command of the language, as is the case of Chinese jurors listening to English utterances in the Hong Kong courtroom. This may also cause a problem for the court interpreter³ as the accuracy of interpretation hinges on the interpreter's correct understanding of the SL utterances. It is therefore important that counsel and judges use accessible language and where possible avoid technical terminology. More importantly, they should make allowance for their Chinese listeners, be they jurors or the interpreter, by articulating slowly and distinctly.

Conclusion

Trial by jury is the backbone of the English legal system and is seen as a symbol of a democratic society. However, a trial before a jury without full access to the trial proceedings necessarily renders the system fundamentally flawed. As Ritter argues, a trial by "a misinformed or under-informed jury is tantamount to a denial of the jury trial right" (2004: 214). For this reason, ensuring jurors' access to the trial in its entirety is essential for them to make an informed decision about the defendant's guilt or innocence. In the context of Hong Kong, adequately addressing and resolving the juror comprehension problem will help broaden the jury pool to improve its representativeness and randomness. At the same time, it will also help ensure the survival of trial by jury in the legal system of Hong Kong, a common law jurisdiction which is now under the sovereignty of China whose judicial system is radically different. The failure to adequately address and resolve this problem may threaten the very survival of the jury system and provide a cogent reason for its ultimate abolition.

Notes

¹Earlier in 2008, I was given the rare permission by the then High Court Registrar to access nine criminal trials from the three levels of courts in HK, including the two jury trials for this study, for teaching and research purposes. The total length of the court proceedings of these nine trials is over 100 hours. I was awarded two grants in 2009 and 2014 to help with the transcription of the bulk of the audio data.

²*Lai She Hung v. HKSAR* [CACC 46/2005].

³Full-time court interpreters in Hong Kong are usually native Cantonese-speakers with English as their “B” (second) language.

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Appendix 1: Transcription Keys

[overlapping talk
(2)	the length of a pause in seconds
(.)	a brief pause of less than half a second
=	latched utterances
—	a sudden cut-off of the current sound
< >	transcriber's descriptions rather than transcriptions
:	prolongation of the immediately prior sound. The length of the row of colons indicates the length of the prolongation
(words)	parenthesised words are indistinct possible hearings
boldface	words in boldface represent elements under discussion