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AUSTRALIAN PLAINTIFF LAWYERS ASSOCIATION

CONFERENCE HAMILTON ISLAND

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SPEAKING TO THE JURY FROM GENERATION X - A NEW

CHALLENGE FOR [PLAINTIFFS'] LAWYERS

The Hon Justice M D Kirby AC CMG

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ABSTRACT

The jury has profoundly influenced the content and procedures of the common law system. It has been described as the bulwark of liberty and the means by which democratic values are regularly brought into the courtrooms of the nation whether in criminal trials or civil causes. Jury trial of civil causes in Australia has diminished in recent years. But it remains common in some jurisdictions, at least in defamation actions, in large claims of EMPLOYER negligence and in claims for damages for torts other than negligence. The thesis of this paper is that the jury is changing. Drawing on research in the United States of America, the author explores one of the chief change that is afoot.

It concerns the advent of jurors from the so-called generation-X, ie people born after 1961. Research suggests that a very large number of such persons have significantly different family experiences, values and aspirations from citizens of earlier generations. Such jurors are commonly more accustomed to communication in digital form and to receiving information in ways which are designed to maximise interest and to minimise time-loss. For such jurors, lengthy addresses by advocates and extended instruction by judges may be a source of intense boredom, irritation or both.

The changes to the jury in the United States have begun to affect the way in which judges instruct juries on the law and advocates address them. The purpose of this paper is to examine the change in jury composition and to explore the impact which the change may have upon judicial communication with juries and upon advocacy before juries of the future. Drawing upon United States data, the author asks how much the experience in that country can be applied to other countries of the common law facing similar developments. If the jury is the bulwark of democracy in the operation of the legal system, it seems likely that judges and lawyers need to adapt their communication and re-examine assumptions that lie at the root of their communications with the jury of the future.

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WHO ARE THEY?

Generation X ("Gen X") is a perfectly respectable expression, although I confess that I rarely heard it mentioned in the upper reaches of the Australian legal profession, at least until quite recently. The expression appears as a noun in both the *Oxford Concise Australian Dictionary* and in the third edition of the

Justice of the High Court of Australia. President of the International Commission of Jurists. The author has derived many of the ideas expressed in this paper from a presentation by Ms Sonya Hamlin, to a conference of the Litigation Section of the American Bar Association in Maui, Hawaii in January 1998. See her book *What Makes Juries Listen Today?* Available: Fax +1-973 890 0042. The book is recommended to those who wish to read more on these themes. An earlier and longer version of this paper was presented to the Australian Bar Association Conference in Dublin, July 1998.

Macquarie Dictionary. The latter defines it as "the generation following the baby-boomers, characterised, in contrast with that group, as being not as easily identifiable as a group, and in particular not being vocal on social issues but rather concerned with individual gain".

This definition is rather unhelpful if you do not know that the "baby-boomers" referred to are persons born in the "baby boom" which coincided with the ending of World War II. According to the same dictionary these people are characterised "initially as vocal on social issues and liberal in outlook but later as concerned with self-advancement and the preservation of their social privileges". All in all, you might say, a generation following a not unfamiliar pattern: inclining to conservatism in mature years coinciding precisely with the time in their lives when they have accumulated some property and status worth conserving.

Experience teaches the dangers of stereotyping individuals, members of particular races or identifiable social groups. By inference, the same dangers exist in the case of an entire generation. This is especially true where the generation grows up in the somewhat different social and cultural environments of, say, Australia, the British Isles and the United States of America. Nevertheless, there are two features of the life of the current generation of younger people, whether in Australia, Europe or the United States (or other developed societies) which are different from those of preceding generations. The two features are inter-

connected. I refer to the globalisation of media, travel, economics, problems and ideas and the technological phenomena which dominate the lives of most young people living in such countries. Relevantly, the latter phenomena include multi-media, the Internet and the World Wide Web. It is the change in the media of communication - both in the outlets of broadcasting and in the Internet - which may have penetrated most deeply the cognitive processes of the generation of young citizens now coming to jury service. The change effects an alteration in the way in which those potential jurors commonly receive, and expect to receive, information and the way they themselves communicate with others and expect others to communicate with them.

It is this change which has led to a great deal of research in the United States, relating especially to communication with so-called seniors (people born before 1943); baby-boomers born between 1943 and 1960) and gen X - the new group, born between 1961 and 1981, now being called up to jury service for the first time¹. Most of the research in the United States concerning gen.x does not relate to their role in juries at all. It concerns the sale of products to them and the differing ways in which merchants and advertisers

1 Sonya Hamlin, *What Makes Juries Listen Today* at 35.

should endeavour to catch their attention². However, some of the lessons derived from such market research appears to have implications for communication with jurors from gen.x. In the United States, this potential is already attracting specific study and expert commentary³.

Adopting the foregoing division of the population, projections of future juries in the United States, as they will be empanelled by the year 2000, suggest that 27% of them will be seniors; 32% baby-boomers and 41% from gen.x. It seems likely that, given roughly similar age composition of our population, the same pattern will be repeated in Australia⁴. With the passage of time, the number of gen.x jurors will increase rapidly. If, therefore, there are indeed special features in the modes of communication with which such jurors feel comfortable, influenced by the technology and information sources they are using every day, it will be important that judges and

² See eg K Ritchie, *Marketing to Generation X*, New York, Lexington Books, 1995. See also Sonya Hamlin, above n 1 at 38.

³ A Stevens, "As Generation X Joins Juries", *Wall Street Journal*, 5 June 1995.

⁴ Australian Bureau of Statistics, *Year Book Australia 1996* reveals that of the Australian population of 17.84 million on 30 June 1994, persons born prior to 1943 were 4.91 million (ie 27.54%). "Baby-boomers", ie born between 1943 and 1960, aged 37 to 54, numbered 5.24 million (ie 29.39%); "Gen.xers", ie born between 1960 and 1980, aged between 17 and 37, numbered 4.89 million (ie 27.46%) of the population.

lawyers should be aware of this. Over time, acquaintance is bound to increase as advocates, accustomed to addressing juries, themselves come from gen.x. But in big cases at least, the advocates at the immediate future are much more likely to be "baby-boomers". For some time, the judges are likely to be "seniors". If, then, there are changes in communication which go beyond the superficially observed differences that exist between every generation and those that came before and come after, it is important that the communicators be aware of the changes. With expert communicators, who pride themselves on their skills with language and whose functions involve explaining and persuading, knowing the audience is the first obligation.

INFORMATION ACQUISITION

Allowing fully for different inclinations in particular cases and the dangers of over-simplification and stereotyping, the decision research survey conducted in 1995 in the United States found notable differences in the ways in which seniors and baby-boomers (on the one hand) and gen.xers (on the other) tend to acquire information and use the media⁵. The former will, on average, read

⁵ N C Nelson, "A new generation of jurors?", *Trial*, July 1997, 54 at 56; Sonya Hamlin, *What Makes Juries Listen Today*, above n 1 at 37.

newspapers and view local television news as the primary source of news and information. They will tend to be passive recipients of entertainment and information supplied by others. People from gen.x are much more likely, in the United States, to view cable news, to read specialised men's, women's and sports magazines, and to exert a high measure of control in the use of information technology to select entertainment and information sources of their particular choosing. People from gen.x are described as selecting⁶:

"Self-focussed, narrow, particular information rather than passively opening up the daily paper and letting a broad cross-section of information wash over them, seeking and perhaps not finding, what particularly interests them."

In a book on marketing to gen.x, the author states⁷:

"Control' is the key word. Far from being passive viewers of television, xers are active channel surfers,

6 H J Risko, "Generation X Jurors: A Challenge" *ABA Journal*, October 1995, 14; Sonya Hamlin, *What Makes Juries Listen Today*, at 38. The Australian Bureau of Statistics estimates that of the 6.4 million households in Australia, 1.5 million have access to a personal computer, ie a 23% take-up rate. In capital cities this increased to 26% while only 16.3% of country areas had a home computer. To estimate access to the Internet, it is necessary to determine how many computers have access to a modem in Australia. The statistics suggest that of the 6.38 million home computers, some 0.028 million have access to a modem, ie 3.9% of home computers. However, the figure in all developed countries is rising rapidly. See ABS, *Australian Demographic Statistics*, June Quarter, 1997, Canberra, 18.

7 Ritchie, above n 2, at 117.

who view with remote control in hand, searching hundreds of options for whatever suits the impulse at the moment [selecting] amongst broadcast programs, cable, pre-recorded videos rented ... shows they've taped ... and video games ... programming dictates selection."

Whereas a "senior" or "baby-boomer", set a task of acquiring information, would probably go to a library or search amongst books, the gen.xer, without leaving home, will commonly plug into the internet, search on-line, select the best references, scan the information given anonymously and download what is needed. This will be done in much shorter time. The gen-xers will not have to dress up to standards expected for a public library in order to conduct their search. They may have a different attitude to providers of information and authority figures. Above all, they will tend to have a different attitude to time. Quite apart from their exposure to interactive information technology, United States research suggests that, before age 18, a typical gen.x child will have spent 22,000 hours watching television. This is more than twice the time spent in school⁸. Exposure to this form of communication involves passivity, inattention, lack of continuity and the presentation of information in comparatively "painless, non-challenging, pureed form using built-in techniques designed to motivate the listener to stay tuned"⁹. If you

⁸ Sonya Hamlin, *What Makes Juries Listen Today* at 43.

⁹ Sonya Hamlin, *What Makes Juries Listen Today* at 43.

are in doubt about this watch a diet of United States television, including news programmes. Or compare the *Time* and *Newsweek* magazine layout today with that of twenty years ago.

It is possible, of course, that Australian gen.xers, served by a national broadcaster and the Special Broadcasting Service, are more accustomed to a BBC style presentation of facts without the entertainment hype that seems to be standard in the broadcasting media of the United States. There, except for public broadcasting, reliance on advertising revenue encourages a mode of presentation which typically lays emphasis on entertainment, variety, novelty and shocking the audience in ways that a national broadcaster at one time disdained. But in Australia, even the publicly funded radio and television broadcasters are now imitating their American counterparts. If they do not contain advertisements for sponsors (which now appear on the Special Broadcasting Service) they present repeated advertisements for themselves and their programmes. Presumably this self-promotion is aimed to capture the attention of a generation of listeners viewers weaned on commercial radio and television which continues to attract much larger average audience ratings. That generation is accustomed to the tight presentation of succinct stories and the use of visual supports (voiceover, graphs, vivid sights and sounds etc). So-called "talking

"heads" have given way to the "sound bite" and "spin". Anything long-winded is liable to fall victim to instant dismissal by remote control¹⁰. A review of the programmes which capture mass audiences on television suggests the interests of gen.x and many of the baby-boomers: comedy, soap operas, entertainment, action with violence and fast moving sport are in. Cerebral subjects tend to be squeezed into remote time slots.

Whilst in Australia and in other English-speaking countries we do better than the United States, because of the statutory charter and traditions of national broadcasters, the general trend of media is certainly in a common direction. In part, this is because of the influence of global media. But, in part, it is doubtless the result of market research chasing audience ratings and aiming to meet perceived audience demand.

LIFE, VALUES, AUTHORITY AND IMPATIENCE

Research in the United States on the profile of gen.x also bears out common experience that their engagement in family life will often have been different from that of baby-boomers and certainly from that of seniors. Thus, in 1960, 88% of children in the

¹⁰ Sonya Hamlin, *What Makes Juries Listen Today* at 44.

United States lived with two parents. By 1988 that figure had dropped to 60%. Now, there is about a 50% chance that a gen.x child will have spent at least one year in a single-parent household. There is a similar pattern at work in Australia. Stereotyped notions of the average juror's experience of "family" may therefore need reconsideration. People who have a different family experience may well have different expectations of human relationships and of human responsibilities.

One feature upon which researchers on gen.xers in the United States seem to agree is that this is the "ultimate shopper generation"¹¹. Sometimes as a palliative to the pain resulting from the breakup of parental relationships, parents and grandparents have spent more on consumer goods for children from gen.x¹². This has encouraged an attitude which expects and demands value and service¹³. Many writers observe a common generational difference in attitudes to work, career and social issues. Because of their family life experience is typically altered and because their attitude to anonymous automated information systems is different, a feature of

11 Sonya Hamlin, *What Makes Juries Listen Today* at 45 quoting William Dunn, *The Baby Bust: A Generation Comes of Age*, Ithaca, American Demographic Books, 1993, 20.

12 Dunn, above n 11 at 31.

13 The 1990 Roper College Track Survey of full-time college students in the United States showed 86% had a car; 61% a credit card; 70% an ATM card and 63% had their own television.

gen.x may be that "[They do not] create any interaction ... any verbal skills"¹⁴. One computer expert, Erick Wujcik, observed of gen.x in the United States¹⁵:

"More than any other generation in American history [they are] game players. They play electronic games, arcade games, computer games, what-have-you. This is the generation of kids raised on games".

Whereas 85% of "seniors" consider that there is too much violence on television that is the opinion of only 57% of Americans under the age of 30¹⁶. Whereas only 20% of "seniors" were numbered amongst the heavy consumers of violence on television, 74% of those under 30 were attracted to such programmes. The stricter control of local broadcasting standards in countries such as Australia may make some of these figures difficult to apply outside the United States. But the inference which a number of United States observers draw from the fantasy, violence and tabloid stock-in-trade to which gen.xers are exposed and expose themselves, is that basically "there are no rules of human behaviour that people

¹⁴ Dunn above n 11 at 48; Sonya Hamlin, *What Makes Juries Listen Today* at 51.

¹⁵ Dunn, above n 11, at 28.

¹⁶ The Times Mirror Center for the People and the Press, *Report*, March 1993 Sonya Hamlin, *What Makes Juries Listen Today* at 53.

cannot break and still manage some kind of a life"¹⁷. Respect for authority figures is down. Impatience for the rapid provision of information (over which they ordinarily have full and immediate control) is up. Live encounters and human interaction has been lessened. Established rules are often suspect. Institutions of citizenship may be viewed cynically and not idealistically. All of this may have consequences when a member of gen.x is called to jury service.

SPEAKING TO GEN X

The inference drawn from the studies of gen.x in the United States, for application to communication with them when they are called to jury service, is telling¹⁸:

"Being forced to listen to something not of their own choosing, such as expert testimony, that is too often boring, tedious, left-brain, fact-filled, technical, abstract and packed with nitty-gritty reality, isn't exactly at the top of anyone's wish list ... But for gen.x's, who can suffuse their lives with large doses of unreality and fantasy at will - with heroes and dragons, MTV and a tailor-made environment created on computers - does any of this include the hard facts of life and the world? ... The change of venue in a video is instantaneous and fantastic and makes no logical or chronological sense. Things happen simply to stimulate appetites that have already seen and heard a great deal".

17 Sonya Hamlin, *What Makes Juries Listen Today* at 54.

18 Sonya Hamlin, *What Makes Juries Listen Today* at 55.

For the generation which communicates by e-mail messages sent remotely and pursues virtual reality, the old sensory judgments in evaluating personality, character, reliability and truth are commonly replaced by digital communication which enjoys both speed and convenience. What is intolerable to gen-x? Lengthy openings to a jury; elaborate reminders of the detail of evidence recently heard; the regurgitation of passages of testimony and, above all, the taking up of time in circumstances where the listener and watcher have lost completely the power of control.

How many times, judges and lawyers have reassured each other that the jury is the microcosm of the community? How often they have said that, once sworn, the jury has a remarkable capacity to put aside external knowledge and old prejudices, concentrating on the task in hand¹⁹. I have myself accepted, and repeated, these assumptions. Until now, such assertions have been fundamental to the legitimacy and authority of the jury in the common law countries which still use them²⁰. Such assumptions may still be correct.

¹⁹ See for recent Australian discussion *Civil Aviation Authority v Australia Broadcasting Corp* (1995) 39 NSWLR 540 at 550. Cf *X v Amalgamated TV Services (No 2)* (1987) 9 NSWLR 575 at 591.

²⁰ cf *Palmer v The Queen* (1998) 71 ALJR 254 at 269, 278. cf Gans, "Directions on the Accused's Interest in the Outcome of the Trial" (1997) 21 *Criminal Law Journal* 273 at 276-277.

Perhaps within the courtroom, with the drama, the responsibility and the seriousness of the occasion, the juror's sense of involvement and obligation takes over from the habits of a lifetime. We must hope so. However, the lesson of the studies of generation-X in the United States of America is that the courts - advocates and judges - are making equivalent demands on gen.xers that, for them, are greater than the demands made on previous generations of jurors. The mindset, and expectation of receiving information, of the use of time and attitudes to life of many gen.xers may be significantly different from those of older jurors who disdain video games, abhor electronic violence and video clips (timed to equal advertising breaks), who have never used e-mail do not know what virtual reality is and have quite different attitudes to authority, to time and to the receipt of information.

The consequences of all this for communication by advocates and judges with juries plainly needs much further study. Specifically, it needs study to gauge its relevance to the marginally different societies outside the United States, such as Australia. So far as judges are concerned, it argues strongly for briefer directions to juries; the avoidance of unnecessary descriptions of the evidence; the severe simplification and clarification of judicial directions on law; and the conduct of proceedings with a briskness suitable to the digital age. So far as the advocate is concerned, the lessons include the avoidance of the "talking heads" mode; the curtailment of long hours of address to the jury; careful attention to enlivening the jurors'

interest, involvement and participation of the juror and brevity and succinctness in the use of precious time.

Judges and advocates who forget these basic lessons may satisfy themselves that they are communicating with the jury in the way their famous forebears did. But they may be overlooking the features of increasing numbers of the new generation now being called up for jury service who have had a different life's experience and who have different expectations. If the art of the advocate is to persuade and the duty of the judge is to explain the law, each will ignore research about generation-X at the peril of failed persuasion and ineffective explanation.

CONCLUSIONS

Typical of a senior, I have now spent much time, as only an authority figure can, conveying a relatively simple message. The racial and cultural background of the community is changing. This is bound to have an impact on the future composition of juries. That impact will not be limited to problems of language. It will extend to different attitudes to authority, to the individual and society that will need to be taken into account in communicating with modern jurors. The arrival of generation-X in jury service brings to the courtroom people with an experience in communication different from that of all jurors who have gone before. At the close of a millennium, it is appropriate to reflect upon the enduring capacity of the jury of citizens to adapt and change and still to be resilient. The advocate

and the judiciary will adapt and change in order to fulfil their tasks, so important to a free society. Whilst juries remain part of the Australian court system, it will be the duty and privilege of advocates and judges to speak to them. It will surely not be beyond the skills of advocates and judges of today to adapt to the changes which I have mentioned. But it requires a recognition of the need for change and of its causes²¹. If the jury is truly to remain a democratic bulwark, it is judges and lawyers - not jurors - who will have to change.

The message I bring is important for all lawyers appearing in jury trials, criminal and civil. It is important for judges presiding in such trials. It is important for defence lawyers in civil trials - fending off the wiles of the plaintiffs' representatives. But it is specially important for plaintiffs' lawyers appearing before juries in civil trials. They carry the onus of proof and the burden of persuasion. It is not exactly a burden like that of Hercules - as Harold Glass once told me it seemed, whenever he was appearing for the plaintiff in the Wollongong civil circuit before a certain judge. But it is a heavy

21 I have not reviewed the possible alteration in facilities for jurors that will eventually accompany the advent of jurors with keyboard and computing skills. Just as "baby-boomer" jurors began to demand facilities for note-taking, access to exhibits and provision of (edited) transcripts, it seems unlikely that future jurors, raised in familiarity with digital technology will be content with such facilities. It may be predicted that they will demand transcript in electronic form, other digitalised information and technical facilities.

responsibility. To the challenges which plaintiffs' lawyers must face it is necessary now to add a new one in those civil causes where juries are still summoned - the challenge of speaking to the juror from generation X. Knowing that the problem exists is the beginning of wisdom.