

# On TRIAL

Where justice is seen to be done...



A groundbreaking  
legal series  
featuring the first  
murder trial  
ever filmed in  
Australia...

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A **STUDY GUIDE** BY MARGUERITE O'HARA



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*Legal programming is one of the last frontiers of factual television in Australia ...*

*There are few places where human drama plays out with as much intrigue as a courtroom. Here all our faults, foibles, misdemeanours and crimes are on display for the world to see. How society deals with these and dispenses justice is a fundamental measure of civilised society.*

— Michael Cordell and Ian Collie, Producers of *On Trial*

# On TRIAL

Where justice is seen to be done...

## INTRODUCTION

*Each year thousands of criminal cases are heard in courts around Australia. Here, some of the most serious crimes are heard before judge and jury. This is where justice is done.*

– Introductory voiceover narration to *On Trial*

*On Trial* is a groundbreaking documentary series featuring unprecedented access to major criminal trials in Australian courts. For the first time cameras have been granted full access to the Supreme Court of Western Australia and the District Court of New South Wales where criminal cases are dealt with before judge and jury.

This five-part series features a controversial murder trial and a major assault. If justice is best served when it is seen to be done, then *On Trial* is a major step towards a fully transparent judicial system.



## CONTENTS OF GUIDE

This guide includes the following sections:

- A. Introductory material and pre-viewing questions.
- B. A chart (Table 1) where students can fill in some of the essential details of the trials as they watch each case unfold.
- C. Sets of questions designed to provoke discussion specific to each of the three court cases i.e. what happens and why does it matter?
- D. Four sets of questions – ‘People’, ‘Time Factors’, ‘Reality and Factual Television’ and ‘Verdicts’ – to encourage students to enter sympathetically into the human drama of the trials from several different perspectives.
- E. The filmmakers’ statements about making *On Trial*.
- F. A glossary of some legal terms used in the trials.
- G. Extension activities where students can test their understanding of the fundamentals of Australia’s legal system, especially as they are revealed in *On Trial*.
- H. References and Resources



## SECTION A: Introductory material and pre-viewing questions

### CURRICULUM RELEVANCE

*On Trial* would be an excellent series to show students at middle and senior secondary levels in the following curriculum areas:

- Legal Studies
- Civics and Citizenship
- SOSE/HSIE
- Values Education
- Media Studies

For teachers and students of Legal Studies at senior secondary levels, *On Trial* would be particularly useful as it deals directly with the content and skills that are central to several curriculum units.

In Victoria, VCE Legal Studies, Unit 1 – ‘Criminal Law in Action’ and Unit 4 – ‘Resolution and Justice’, students explore a number of areas of the criminal justice system. See <<http://www.vcaa.vic.edu.au/vcaa/vce/studies/legalstudies/legalstudiesd-2011.pdf>>.

In NSW, Legal Studies subjects fall within the broad HSIE curriculum area. In the Board of Studies HSC curriculum Stage 6 syllabus, Part 1 Core Unit – ‘Crime’ includes material on ‘The Criminal Trial Process’ and ‘Sentencing and Punishment’. Pages 17 and 18 of the Board of Studies document describe topics covered at <[\[www.boardofstudies.nsw.edu.au/syllabus\\\_hsc/pdf\\\_doc/legal-studies-syllabus-st6.pdf\]\(http://www.boardofstudies.nsw.edu.au/syllabus\_hsc/pdf\_doc/legal-studies-syllabus-st6.pdf\)>.](http://</a></p></div><div data-bbox=)

In WA, WACE Politics and Law is divided into three content areas. *On Trial* is particularly relevant to ‘political and legal systems’ and ‘political and legal issues’. See <[http://www.curriculum.wa.edu.au/internet/Senior\\_Secondary/Courses/WACE\\_Courses/Politics\\_and\\_Law](http://www.curriculum.wa.edu.au/internet/Senior_Secondary/Courses/WACE_Courses/Politics_and_Law)>. For middle school, it is most relevant within the ‘Political and Legal Systems’ aspect of the ‘Natural and Social Systems’ area of Society and Environment. See <[http://det.wa.edu.au/redirect/?oid=com.arsdigita.cms.contenttypes.FileStorageItem-id-10901193&stream\\_asset=true](http://det.wa.edu.au/redirect/?oid=com.arsdigita.cms.contenttypes.FileStorageItem-id-10901193&stream_asset=true)>.

*On Trial* would be enjoyed by middle school students as it offers an excellent introduction to the legal system that is neither dry nor dull. Students may have watched some of the many popular legal dramas on television, such as the American series *Law and Order*. The intricacies of the legal system, watching how people behave under pressure and questions of ‘whodunit’, ‘why and how’ and ‘what will happen to them now’ continue to fascinate viewers of all ages. Many legal dramas on television, such as *Law and Order*, concern the workings of the American legal system and do

not accurately reflect the conduct of criminal trials in Australia.

Drama series such as the long-running British program *Rumpole of the Bailey* (BBC television 1978–1992) about an eccentric criminal barrister, and *Rake* (ABC television, 2010), a recent series about the activities of a colourful fictionalised Sydney barrister, offer a more realistic picture of what happens in a criminal trial in Australian courts, though the dramas of the courtroom are exaggerated for comic effect. The focus in these programs is often on the personality and domestic life of the main character, as is suggested in the program titles. In another recent ABC legal series *Crownies* (2011), the focus is similarly as much on the lives of the young lawyers as it is on the court cases.

*On Trial* is different. In this observational documentary series, the lawyers, the judges, the accused and the witnesses are often as vivid and engaging as any characters in fictional television dramas, but they are real people. The compelling human stories of these three trials make for gripping television.

It would be possible to show the three trials that make up *On Trial* independently, as the cases are conducted in different courts and jurisdictions with

lawyers whose styles are quite different. While the trials are not internally linked within the series, watching all three provides a diverse picture of how courts and lawyers work in Australia today.

The ABC television website for *On Trial* includes an image gallery, background information about how the series was made, director and producer statements and a link to an ABC blog where Peter Lavac, the defence barrister in the first case, talks about the role of the defence lawyer. See <http://www.abc.net.au/tv/geo/documentaries/interactive/ontrial/>.

The five-part series is available for purchase through ABC shops and online.

Teachers could select from the material and related student activities listed in the contents on page 3 of this guide. How much they choose to do will depend on the age, interests and level of understanding of their students. Not all students will need to work through the more basic information about criminal law in Australia (Section G) or the glossary of legal terms used in the program (Section F).

Advice to teachers: it may be wise to preview episodes 3 and 4 of *On Trial* as the murder trial covered in these episodes contains some quite graphic descriptions and stylised depictions of a violent killing. While photos taken at the crime scene are not shown in court or in the program, some of the material could be distressing to some students.

## PROGRAM OUTLINE

In the tradition of documentary courtroom classics like *The Staircase* (2004), an eight-part true crime drama, and *Paradise Lost* (1996), *On Trial* takes viewers behind the scenes as they observe the emotional and legal journeys of the accused. Each case provides key insights into often controversial legal processes, our adversarial legal system, and the day-to-day operation of our courts.

*On Trial* charts the stories of both prosecution and defence as they undertake pre-trial preparations in the tense build-up before going to court. The series covers the process of empanelling juries, opening addresses, examination of witnesses, cross-examination and the summing-up to juries and, if found guilty, sentencing.

As well as charting the legal journey, the series traces the intimate emotional stories of the characters through observational coverage outside the court. The result is powerful observational documentary drama.

Produced by Ian Collie and Michael Cordell, the team responsible for *A Case for the Coroner*, *DIY Law* and *Suspicious Minds*, *On Trial* provides a rare insight into the criminal justice system and how people behave under pressure.

## BACKGROUND INFORMATION

Every year thousands of criminal cases are heard before Supreme, District or County Courts throughout Australia. These courts are awash with troubled humanity. In the criminal jurisdiction, matters can range from unlawful killings like murder and manslaughter to drug offences, armed robbery, sexual assault, white-collar crime, assault with grievous bodily harm and domestic violence.

Australian Federal Police drug cases and breaches of anti-terrorism legislation are also heard in the District Court. The District Court of New South Wales, for example, hears about eighty matters a month, although half of these are no billed or a guilty plea is entered. Generally a case will take about four months from committal to commencement of trial. Of the matters that proceed to trial (the average length of a trial is two weeks) only a small percentage are appealed. An appeal takes about two to four months to be heard by the Court of Criminal Appeal and most appeals tend to be about sentencing.

## PRE-VIEWING QUESTIONS

1. Have you ever attended a court hearing either as a witness, to support a family member or as a visitor to a court as part of your schooling?
2. What are the most common reasons for people going to court? Which courts would most of us be more likely to attend?
3. What does the term 'The Crown versus X or Y' mean?
4. What are some of the unfamiliar and often intimidating aspects of courts – the formal setting, the language, the wigs and gowns, the sense of drama, fear of not being heard and of not being sure about what to say and do, judgement?
5. Who is responsible for gathering the evidence needed for a trial to proceed?
6. What is your understanding of the main differences between the roles of solicitors and barristers in Australia?
7. Share your knowledge of how juries are chosen in Australia, e.g. who does not have to serve on a jury and how are jury members selected or rejected?
8. What is the most important aspect of the work of a jury?
9. What skills do you think are important for barristers to be successful?
10. What is the difference between the work of a prosecutor and a defence lawyer?
11. What characteristics are often common to barristers, attorneys and counsel portrayed in television legal dramas?
12. What processes are available to people who believe they have been wrongly convicted of a criminal offence?

## SECTION B: Outline and chart

Three trials are shown in this series. Cases 1 and 2 are each shown over two one-hour episodes while Case 3 is shown in the final one-hour episode 5.

The table on pages 7 and 8 lists the key elements and the individuals involved in a criminal trial. Some parts of Case 1 have been filled in as a guide; other sections can only be completed after you have watched the trial. This table outlines the bare bones of each trial. It could be used as a reference point as you work through the sets of questions in this guide about each case.

The table does not list one of the most important elements of any court case – the evidence – though there is a box where you can list the names of key witnesses whose testimony constitutes part of the evidence in many trials.

Other sections of this guide encourage you to discuss aspects of the trials and court processes that go beyond identifying the main figures in these trials.

Appreciating the various roles of people involved in a trial requires considerable concentration. Following the legal intricacies of a trial is demanding. One of the best ways to evaluate the significance and reliability of the evidence presented in each of these trials is to imagine you are a member of the jury in each case – an attentive observer. However, as outside viewers of the proceedings of each trial, you have an advantage over the jury in what you are shown and hear. As you watch Episode 1, identify what we see as viewers of the program that the jury doesn't see or hear.



<b>THE TRIALS</b>	
Case 1: Two one-hour episodes Episode titles	Episode 1: 'Proof or Truth?' Episode 2: 'Where the Truth Lies'
Court and location of trial	District Court of NSW, Sydney
Accused – name and age	Jason Courtney, 33
Alleged victim – name and approximate age	Paul Magyar, early thirties
Charges	Holding a pistol to the head of another man and threatening to shoot him, involving three specific charges: <ul style="list-style-type: none"> <li>- Possessing a unique brand pistol</li> <li>- Using a weapon to intimidate</li> <li>- Deliberately discharging a firearm</li> </ul>
Plea	Not Guilty to all charges
Time spent 'on remand' awaiting trial	
Prosecution	Tim MacIntosh, Crown Prosecutor
Defence team	Peter Lavac and Jehane Ghabrial
Judge	Judge Mark Marien S.C.
Jury – approximate ages and gender	
Verdict	
Sentence	
Duration of the trial before the jury retires	13 days
Witnesses	Craig Gladstone (friend of Magyar, present on that night) Police officers
Family	Family of the accused attend court, partner of alleged victim attends court

Case 2: Two one-hour episodes Episode titles	Episode 3: Episode 4:
Court and location of trial	
Accused – name and age	
Alleged victim – name and approximate age	
Charges	
Plea	

Time spent 'on remand' awaiting trial	
Prosecution	
Defence team	
Judge	
Jury (unseen in this case for legal reasons)	
Verdict	
Sentence	
Duration of the trial before the jury retires	
Witnesses	
Family	

Case 3: One-hour episode Episode title	Episode 5:
Court and location of trial	
Accused – name and age	
Alleged victim – name and age	
Charges	
Plea	
Time spent 'on remand' awaiting trial	
Prosecution	
Defence team	
Judge	
Jury	
Verdict	
Sentence	
Duration of the trial before the jury retires	
Witnesses	
Family	

# SECTION C:

## The three court cases

### CASE 1: THE CROWN VERSUS JASON COURTNEY

A man is accused of holding a pistol to the head of another man and threatening to shoot him.

*Anyone who is charged with a criminal offence is under the law presumed to be innocent of that offence at all times, unless and until the prosecution has proved its case beyond reasonable doubt to the satisfaction of the jury.*

*Judge Mark Marien*

*It's a play between proof and truth – a particularly well observed game to protect the accused.*

*Prosecutor Tim MacIntosh*

*It's incredibly stressful at times because you have a person's liberty at stake.*

*Defence barrister Peter Lavac*



### EPISODE 1 PROOF OR TRUTH?

- On what charges is Jason Courtney standing trial?
- What is at stake for him if he is found guilty on the various firearms charges?
- How does defence barrister, Peter Lavac, characterise the adversarial nature of a criminal trial?
- How does Judge Marien see his role in the trial?
- Briefly outline the prosecution's account of the events in the hotel toilet on the night in question?
- What strategy does the defence team employ in this case to cast doubt into the minds of the jury? What motivation does Lavac suggest is at the heart of Paul Magyar's account of what happened?
- What are the central facts about the incident that occurred in the hotel toilets that make it possible for the prosecution and the defence to present two such conflicting accounts of these events, i.e. who did what and who saw it happen?
- Outline the evidence presented by the prosecution to prove their case concerning Jason's behaviour on the night of the incident.
- How do the defence team present an alternative version of what happened that night that sounds quite credible?
- Explain the uncertainty about the reliability of the DNA evidence that makes it possible for the defence team to have all evidence relating to the pistol omitted from the trial and not put before the jury?
- What is 'tendency evidence'?
- How is Jason's sworn evidence that he had never owned or used a gun brought into question by a photo of him showing otherwise that the prosecution want shown to the jury? Why is this material not shown to the jury?
- What further attempts do the defence lawyers make to have the jury dismissed?



## CASE 2: THE CROWN VERSUS ANTHONY EVANS

**The question is – what was Anthony Evans’ state of mind at the time he killed his girlfriend Alana Dakin?**

Anthony Evans, a 34-year-old mechanic, is accused of murdering his girlfriend by cutting her throat with a fishing knife. The producers have been given unprecedented access to film the controversial case in the Supreme Court of Western Australia. As the first murder trial filmed in Australian history, this is a ground-breaking documentary.

‘Doomed from the Start’ is the first episode in the two-part story chronicling the gruesome killing and the battle to prove Evans’ guilt or innocence.

The trial of Anthony Evans is a re-trial. In his first trial, Evans was found guilty of murder. On appeal, the court found that serious mistakes had been made, particularly with the directions of the trial judge to the jury, and ordered a retrial.

The second time round, his defence team entered a new plea of unsound mind, or the ‘insanity defence’ as it is more commonly known. They conceded that Anthony Evans killed his de facto girlfriend Alana by slashing her throat with a knife. But was he insane at the time? Or was there sufficient provocation or diminished responsibility for a jury to return the lesser conviction of manslaughter?

### EPISODE 2 WHERE THE TRUTH LIES

As the trial draws to a close the jury takes four agonising days to come to a decision. Have they agreed with the accused’s claim that he was the real victim, or simply that the Prosecution has not proved its case beyond reasonable doubt?

- What are the key points Crown Prosecutor Tim MacIntosh makes to the jury about his interpretation of the key factors that support the prosecution case?
- Defence barrister Peter Lavac’s closing address to the jury takes eight hours as he goes through all the reasons why Jason Courtney should be acquitted. What are the holes he claims exist in the prosecution case?
- How significant for the outcome of the case is it that no bullet was found at the site of the incident where the prosecution claimed Courtney fired the pistol?
- How useful was the CCTV camera footage in this case for identifying what really happened in the toilets?
- Why is Jason Courtney’s appearance in court a new and possibly major problem for his defence team? How might the change in his appearance assist the prosecution case?
- What do we see and hear of the jury’s reaction to the Judge’s explanation of why Jason has a black eye? How could this reaction potentially lead to the case being dismissed and the trial aborted?
- When the jury are finally sent off by the judge to consider their verdict, what instructions are they given?
- The lawyers speculate about why the jury is out for four days considering their verdict. Can they or anyone else know what really happens inside the jury room?
- What are some of the queries the jury want the judge to clarify as they deliberate about their verdicts?
- Does the lengthy time in which the jury is trying to reach agreed verdicts on each charge favour the outcome for the defence or the prosecution?
- What does the jury finally decide about Courtney’s guilt or innocence on the three charges?
- What do we learn about previous legal processes in relation to this case before this trial?
- What option is still available to the prosecution?
- Were you surprised at Courtney’s change of plea after what we have seen and heard in this trial?
- What does he do and say in court that may influence the sentence he finally receives for the crimes he has committed?





PROSECUTION CASE	DEFENCE CASE
<p>The accused caused the death of Alana Dakin unlawfully.</p> <p>When he caused her death he intended to do her some grievous bodily harm.</p> <p>If we prove these two things, along with the fact that Evans killed Alana, then we will have proved the crime of murder ... and we have to prove those things beyond reasonable doubt.</p> <p>If we prove the fact of the killing and the unlawfulness of the killing but not that the accused intended to do grievous bodily harm, we will have proved the crime of manslaughter.</p>	<p>This is not a 'whodunit' trial; this is a trial that is all about why Anthony Evans killed Alana Dakin.</p> <p>Anthony's reactions to the volatile relationship between himself and Alana were profoundly influenced by two factors:</p> <ol style="list-style-type: none"> <li>1. Anthony was (and even after her death) completely in love with Alana and motivated by a desire to save her from herself.</li> <li>2. He was a chronic schizophrenic and insane at the time of the killing.</li> </ol>

### EPISODE 3 DOOMED FROM THE START

*We think the history of domestic violence is an essential part of the background against which the events of the killing itself happen to be understood.*

– Greg Yovich, Crown Prosecutor

*The ultimate issue for the jury will be the question of whether Evans was of sound mind at the time of the killing.*

– David Edwardson QC, defence barrister

- What visuals are shown in the opening shots of this episode that relate to the death of Alana Dakin?
- What admission does Mr Edwardson QC make at the opening of the trial? What finding does he want the jury to return in this trial?
- The 'why' more than the 'how'. Why are the defence lawyers so concerned that the jury hear the full story of 'why' in relation to the death of Alana?
- Outline the main facts of the case as presented by the prosecutor.
- In what ways are the prosecution and defence teams similarly dependent on the two-hour videotaped record of interview taken just hours after the death of Alana to support their respective cases?
- What happens on the second day that threatens to abort this trial? How does the judge avert the defence team's concern that members of the jury will probably access information about an earlier trial in the media?
- What evidence is given by the following people about Alana concerning the time leading up to her death – the bottle shop attendant, Jane Maton (Alana's friend), the women's refuge worker and Senior Sergeant Chris Ruck who attended the Evans' house after Alana had been drinking heavily? How might
- David Edwardson QC is the senior defence barrister for Evans. What is central to the defence case, given that there is no dispute about who killed Alana?
- What crucial evidence does Crown Prosecutor Paul Yovich introduce very early in this case? What use does he make of this material to support his case that Evans knew what he was doing when he killed Alana in 2007, three years before this second trial for murder?
- How does Linda Black, the junior defence barrister, describe what she feels about the responsibility of Anthony's defence team?



*examination if the jury doesn't understand them, so I try to use ordinary words and short sentences.*

– Paul Yovich, Prosecutor

- The defence need to convince the jury that Anthony Evans was of unsound mind at the time of the murder or that he was somehow provoked. What kind of evidence do they intend to use in court to support these contentions?
- How is Anthony Evans responding to the ongoing pressure of this second trial, particularly when his mental state is being discussed in court in his presence?
- What do family members tell the court about how Anthony's behaviour changed as he grew up? What were some of the odd behaviours they witnessed that suggested he may have some form of mental illness?

**Expert witness evidence – interpreting the police interview. What does it show about Anthony's mental state?**

- Who is the expert witness called on by the defence team to testify about Anthony's mental state? What is his connection to Anthony?

What does he suggest Anthony's psychiatric history reveals about his mental health?

Secondly, what does he think is revealed about Anthony's mental state throughout the police record of interview after the killing of Alana? (Keep in mind that the jurors have seen and heard this taped record of interview)

- Doctor Walton explains that a psychosis is 'characterised by the person being out of touch with reality'. What mental illness does he suggest is an example of a psychosis?
- How is the 'psychotic episode'?

this testimony support the Crown case?

- How does Anthony's father's account of the relationship between his son and Alana lend some weight to the defence contention about Anthony's psychological condition? How do you think a jury would respond to this account of a dysfunctional relationship where alcohol abuse and violence seem to have been part of the dynamic?
- The jury (and by extension viewers) only see diagrammatic representations of the knife wounds that resulted in Alana's death. Why do you think the lawyers agree not to show distressing photos from the crime scene?

- This episode ends with family members expressing their concerns about the way the trial is going. What are the main concerns of the Evans and Dakin families?

**EPISODE 4  
A DIFFERENCE OF OPINION**

*This case is unusual because the question of sanity is a very live issue and that is an issue where it is for the accused to prove on the balance of probabilities. It's the one defence in the law that's truly a defence.*

– Justice John McKechnie

*It's a big challenge to communicate technical evidence, particularly contested technical evidence. There's no point in ... scoring goals in cross-*

explanation of why Anthony killed Alana at odds with the prosecution's explanation?

- What does the prosecution believe that the recorded police interview shows about Anthony's mental state at the time of the killings?
- How could these different readings of what the interview reveals make it difficult for the jurors to come to a decision about Anthony's mental state at the time of the killing?
- Dr. Walton uses the terms 'odd behaviours' and 'mentally disordered' to characterise Anthony's answers to police at the interview where he talks, amongst other things, about spirituality. Do these phrases necessarily suggest mental illness?
- What concessions are made by the prosecution and the judge to the defence's requests that Anthony is becoming distressed as the psychiatric evidence continues?
- How do psychiatrist Dr. Walton and prosecutor Paul Yovich interpret what Anthony told the police about why he showered after the killing? Is either interpretation any more plausible than the other or just a matter of semantics?
- How does Dr. Pascou, a psychiatrist who has had some contact with the accused man, assess his mental state at the time of the killing?
- Dr Adam Brett is a psychiatrist called by the prosecution to present an alternative hypothesis and evidence about Anthony's condition at the time of the killing. What does his 'differential diagnosis' mean in layman's terms?
- Domestic violence, emotional upset and alcohol use are three acknowledged contextual situations leading up to the killing. What additional belief about Anthony's mental state is absent from this hypothesis about why he killed Alana?
- Is having 'significant mental health problems' a defence that mitigates culpability for committing a crime?
- How might Dr Brett's agreement with the defence counsel that his diagnosis of Anthony's state of mind as 'only one of several possible explanations' look like a positive outcome for the defence team's cross-examination?



## CLOSING, DELIBERATING AND SENTENCING

- Why do the defence team decide to make a relatively brief closing summation to the jury?
- What is the crucial direction of the law that the Judge gives the jury before they retire to consider their verdict?
- Why does the jury have to return a unanimous verdict in this case?
- What is the verdict? Was this what you expected after listening to the evidence?
- What is the sentence handed down by the judge? What does this sentence mean in terms of real time to be served?
- How do both the prosecution and the defence react to the verdict and sentence?
- Is this the end of the legal argument about Anthony Evans' crime? What might happen next?
- Terms such as 'madness' and 'mental illness' cover a range of conditions and behaviours. Why are they such difficult notions to argue in relation to one person killing another, which many people would see as an act of madness?

### CASE 3: THE CROWN VERSUS STEVEN TOFALA'AO

DNA evidence has become one of the most potent weapons in the armoury of law enforcement. But will DNA evidence convict a young man of robbing and assaulting an elderly taxi driver? The accused claims he wasn't even at the scene of the crime.

In 2005, two men hailed a taxi in central Sydney. The driver was Albert Frankland, a seventy-two year old who had been driving cabs for over twenty years. Not long into the journey the two passengers demanded Frankland's money. Feeling threatened by their size he handed over all his cash, then the rear-seat passenger leant over and rifled in his top pocket for more. Frankland was then punched in the face before the two men stole his cab. It is the sort of crime that sends shivers up every cabby's spine.

Three years later the case is in the District Court of NSW. Steven Tofala'ao, 22, a labourer from western Sydney, sits in the dock facing four charges including robbery, assault and theft. If found guilty, he faces many years in jail.

But there is only one piece of evidence in the case against Tofala'ao. A year after the crime, forensic testing matched DNA found in the taxi driver's pocket with a sample of DNA taken from Tofala'ao during an un-related police investigation.

#### EPISODE 5 DNA ... DNA

*If there was no DNA, this man wouldn't be on trial.*

– Theo Voros, defence lawyer

*The jury just have to be satisfied beyond reasonable doubt that the manner in which the DNA got on the shirt is the way that the victim said it did.*

– Prosecutor Mervyn Grogan

*It's very important for the judge to ensure that there's no prejudice to*



*the accused. For example, it would be most unfortunate if a jury became aware that an accused person had a prior criminal record because that could be very prejudicial when they're deciding whether he committed the offence in question.*

– Judge Helen Murrell

*They were obviously trying to pick holes in my story and I was the guy that was there and I knew what happened and so I was pretty adamant about telling the story the way it did happen and it wasn't a very nice experience and I wouldn't like it to happen again by any means.*

*So yeah, I was getting a little bit cranky at the end of it all.*

– Albert Frankland, the taxi driver

- What does Tofala'ao plead to the charges? What is central to his 'Not Guilty' plea?
- How many challenges to who sits on the jury does each side have? For what reasons does Theo Voros, the defence lawyer, challenge potential jurors? How important might the composition of a jury be, in terms of their age, gender and even race?
- What are the key elements of the account given by Crown Prosecutor Mervyn Grogan of Tofala'ao's part in the robbery and assault of the taxi driver? Why does Grogan believe the evidence placing Tofala'ao at the scene of the crime is fairly strong?



- By contrast, what is the defence case?
- How does Albert Frankland come across when he is being questioned about the events of the morning in 2005 when he was assaulted and robbed? Is his account of what happened delivered in a way that suggests he has clear recall of what happened?
- In what ways does the defence attempt to challenge the accuracy of Frankland's testimony?

How does their strategy affect Frankland?

- Do you think you would clearly remember exactly where someone put their fingers on your shirt if you were grabbed while being robbed several years ago?
- How does the frequently inevitable delay between the commission of a crime and an arrest and trial make it imperative that detailed statements about an incident are recorded at the time?
- Does the jury know that police already had a sample of the accused's DNA from an earlier investigation for which he was acquitted?
- Why is the police testimony so

important about how the DNA on the taxi driver's shirt was collected and stored? How many different police officers were initially engaged in collecting evidence at the time of the assault and robbery of the taxi driver?

- Why is Voros making so much of the time between when the shirt was bagged in an evidence bag and the time when it was booked in to the exhibit room at Marrickville police station?
- How does Voros attempt to plant doubt in the minds of the jurors about the possibility of the evidence being tampered with in some way and possibly contaminated? If this defence is taken on board by jurors, how could it determine the outcome of the court case?
- What different interpretations of the reliability of DNA evidence are given by the two expert witnesses called respectively by the defence and the prosecution?
- Are semen, saliva or skin cells more likely to be useful as samples that can be used to identify DNA? Is it possible for Vivien Beilby, the molecular geneticist, to confidently identify the source of the DNA found on the taxi driver's shirt?
- How does the defence's key expert

witness cast doubt on how the DNA got on to the shirt?

- When Theo Voros puts to his expert witness, Dr. McDonald, the scenario that the blue shirt might have been swabbed with a buckle swab that had been taken from Tofala'ao some time ago in an unrelated matter, the prosecution object and ask for the jury to be removed from the court while the lawyers discuss the admissibility of this DNA evidence in the case. Why is the defence question so potentially damaging for the prosecution?
- On what basis, in relation to earlier testimony from the prosecution's expert witness, does the judge decide to allow the defence question to be put?
- When the Prosecutor asks Dr. McDonald – 'Do you agree or disagree with the proposition that a possible explanation for the accused's DNA being on the shirt is via skin cells from touching?', McDonald's answer is 'Not entirely, no'. Is this answer more favourable to the prosecution or defence case?
- What does the prosecutor emphasise in his closing arguments to the jury? What is the difference in 'drawing inferences' and 'evidence'?



- What is the main thrust of the defence's closing address to the jury? How does Voros suggest that racial stereotyping may be a factor in the taxi driver's evidence?
- Defendants are not obliged to take the stand and give evidence in criminal trials in Australia. Why do you think Tofala'ao chose not to take the stand in this case?
- Can an accused's silence ever be considered as an admission of guilt?
- How does this case clearly demonstrate the importance of the judge's instruction to the jury to presume the defendant is innocent unless the prosecution has demonstrated his guilt beyond reasonable doubt?
- What does the judge suggest should be the critical issue for the jury?
- When the jury returns with their verdicts on the four counts, after two and a half hours of delibera-

tion – (1) robbery in company (2) maliciously inflicting grievous bodily harm (3) assault occasioning actual bodily harm and (4) stealing a motor vehicle, they deliver unanimous verdicts on all the charges – guilty on three charges but not guilty on one charge. Why do you think they were unable to return guilty verdicts on all the charges?

- When the court re-convenes, for what crimes is Tofala'ao being sentenced?
- What matters do the defence and prosecutor want put to the judge before the sentences are handed down? Which of these matters was presented in writing to the judge to be considered before sentencing?
- Describe the main points made by Albert Frankland, the taxi driver, in his Victim Impact Statement. What outcome does he want? Do you think it is a good thing that the accused hears from the victim of a crime?
- The judge, before sentencing

Tofala'ao, outlines the factors she believes are relevant to the sentence she is about to hand down. They are (1) that his entire criminal history seems to be related to alcohol and/or other drugs, (2) he has an almost complete lack of memory of the incident, (3) he is young, (4) he has not previously been imprisoned and (5) he needs a long period of support in relation to drug and alcohol and emotional issues when he re-enters the community.

In light of these factors and the crimes for which Tofala'ao has been found guilty, do you think the three and a half years he will have to serve before being eligible for parole is an appropriate sentence? Give your reasons based on the evidence and what the judge has said about Tofala'ao.

# SECTION D:

## From the juror's perspective

The following information and related questions are relevant to each of the three trials.

- (1) The People
- (2) Time Factors
- (3) Reality and Factual Television
- (4) Verdicts

### 1. The people

Court cases are essentially human dramas. There are many factors that make being part of any court case stressful.

Consider the particular stresses placed on jurors\* as well as on family members who attend court to support a family member, whether this is the accused or the alleged victim. Note how the different feelings people have are revealed through what we see and hear during the trial. For each individual or group, identify one particular scene where the strength of their responses is revealed.

In the table below, make brief notes about how the individuals who have a part to play in each trial reveal or express their emotions during the trial.

### 2. Time Factors

Court cases are time consuming and involve many people. As stated in the introduction to this guide:

*The District Court of New South Wales, for example, hears about eighty matters a month, although half of these are no billed or a guilty plea is entered. Generally a case will take about four months from committal to commencement of trial. Of the matters that proceed to trial (the average length of a trial is two weeks) only a small percentage are appealed. An appeal takes about two to four months to be heard by the Court of Criminal Appeal and most appeals tend to be about sentencing.*

Jason Courtney's trial took place over several weeks. Evidence was given over eleven days, closing speeches from the prosecutor and defence counsel took another day and a half and several hours were spent in the judge's chamber where the defence argued (unsuccessfully) for the jury to be discharged.

The jury deliberations took place over a week. This was partly because they asked questions for legal clarification

### \*Being a juror in Australia

Each year in Australia thousands of people are called up to serve on a jury, their names randomly selected from electoral rolls. Some groups are exempt from serving on juries such as health professionals and police officers. To read more about this civic duty and the process of empanelling a jury, go to <[http://www.dotag.wa.gov.au/C/called\\_for\\_jury\\_duty.aspx?uid=4229-3447-3799-1045](http://www.dotag.wa.gov.au/C/called_for_jury_duty.aspx?uid=4229-3447-3799-1045)>. While this information comes from a Western Australian Government website, the situation and regulations about jury service and exemptions are similar in most states and territories.

Legislation for filming juries in Western Australia is more prohibitive than in NSW so the filmmakers were unable to include footage of the jury in Episodes 3 and 4 (the Evans murder trial).

You will find information about the jury selection process at this NSW Law Reform Commission website at <<http://www.ipc.nsw.gov.au/lrc.nsf/pages/DP12CHP4>>.

IN COURT	
Indicate the case you are writing about here – Case 1 (Courtney), Case 2 (Evans) or Case 3 (Tofala'ao)	
Judge	
Prosecutor	
Defence team	
Accused	
Victim	
Members of the jury (not allowed to be shown in the Evans murder trial)	
Family of the accused	
Family of the victim	
Witnesses	



from the judge (sending seven written requests), they wanted to handle the gun, and because a juror became ill. It was also because they were divided over the verdicts, only able to find the accused guilty on one of the three counts. In the series' production notes, director Susan Lambert talks about the effects on the film crew of the unexpectedly long delay in the jury reaching a verdict in the Courtney case: 'having three crews standing by for five days so we could cover all the main characters' responses to the verdict was both incredibly boring and incredibly tense'. No one can predict how long a jury will take to arrive at a verdict.

Before Jason Courtney is sentenced after deciding to plead guilty to one charge of possessing an unlicensed pistol (a dramatic turnaround to what he claimed at his trial), he makes a statement to the judge, apologising for what has happened and indicating that he knows he has caused harm to himself and to others and wasted court time by denying possession of a firearm. When he is given a custodial sentence, the judge takes account of the ten months he has already spent locked up on remand.

Paul Magyar, the victim, has had to live through three court cases over the two years since the incident at the hotel in May 2006.

- Approximately how much time has elapsed between the arrest of the suspect and the trial we witness in each of the three cases?
- How can being held on remand, sometimes for many months because bail was refused, affect the length of the jail sentence handed down when an accused person is found guilty?
- Outline the different time frames in which each crime, the trial, the time leading up to sentencing and the television time in which the program is shown, e.g. how many minutes passed during the encounter in the toilets in Trial 1 or the robbery and assault of the taxi driver in the third trial?

- What approximate percentage of the actual time taken for the trial do we see in the edited version of each of these trials?

### 3. Reality and factual television

Television programs using real people – whether in factual observational documentaries such as *On Trial* or so-called ‘reality television’ programs such as *Masterchef* or *The Block* – all select (from their hours of film footage) material that will make the most interesting, entertaining and dramatic program. Reality television is essentially a construct, e.g. the often highly stylised and edited dramas we see in cooking competitions such as *Masterchef* or *My Kitchen Rules* or, in a very different example, the two-week journey of ordinary Australians experiencing some of the realities of life for asylum seekers in *Go Back to Where You Came From*. They are ‘real’ in only a quite limited sense of that word.

*On Trial* is an observational documentary, a factual program. It is ‘reality television’ that is totally unlike much of what is shown on television in the ‘reality’ TV genre. While, like any observational documentary, it is constructed and edited to present the many moments that constitute the drama of a trial and the range of personalities that are part of the story on show, it is presenting actual trials with real people. This is factual television.

- What would ‘reality’ television be like if it really did offer ‘a day in the life of ...’? Is everything that you do in a day of interest to others? Select thirty minutes of a day in your family’s life that would make really gripping television.
- Is everything that happens over the weeks that some court cases take place likely to be interesting to people inside and outside the courtroom?
- Why would it not be possible, or desirable, to film the jury deliberations in a trial?
- There is a law forbidding the face and/or identity of a juror being revealed during a trial, so the television crew had to wait until

after these trials to get permission from jurors for their faces to be shown in the series. In the Western Australian murder case the jury could not be shown on camera at all. How interesting and important to understanding the role of the juries is the footage of their responses and body language taken during the two trials where we see them?

- How is the drama, the intrigue and the uncertainty of a criminal trial shown in this series? Is the camera a neutral observer?
- How did the opening visuals, the music, the close-ups of the defendants and the shots of people coming and going from court intensify and build the drama?
- What effect might the presence of cameras and microphones have on how people present themselves?
- In what ways is the natural theatre of a courtroom, its staging and formality, a natural fit for showing people under pressure in situations that will change many lives forever?
- What do we see of what might be described as ‘down time’ for the major players in this trial, including the lawyers, the judge, the accused, the jury and the family members?

### 4. Verdicts

*Because this is such a tragic case, I don’t feel any sense of triumph at the verdict.*

– Prosecutor Paul Yovich after the Evans verdict

- Did the verdicts offer justice to both parties in each of these cases – accused and victim? Were they fair outcomes? Were they a vindication of the judicial system to try people fairly or did any of them look to be something of a game for the legal teams to play out?
- What do you think was the most crucial evidence used to prove or fail to prove the charges in each case?

- How important was the following type of evidence in each case – security camera footage, forensic evidence and witness statements – in determining the outcome of each trial?
- What part did alcohol abuse play in what happened in each of these cases?
- Should the fact that an offender was drug or alcohol affected at the time when they committed a crime be taken into account when they are sentenced? Should it mitigate the severity of a sentence?
- How difficult do you think it would be for members of a jury to focus only on the evidence presented without allowing their pre-conceptions and perceptions of how the accused person presented in court to influence their deliberations?
- What is the difference between a fair outcome and justice being done? Is it ever possible to know what really happened when a crime was committed?
- With all its faults, how well do you think the judge and jury system generally works in delivering just outcomes?
- Although there were some guilty verdicts handed down in each of these cases, were all the sentences accepted as appropriate by the families of the victims?



# SECTION E:

## Making *On Trial*

*On Trial* was produced by Michael Cordell and Ian Collie. Here is their producers' statement about the challenges in making this series.

*Ian and I have made a series of documentaries on the Australian legal system over the last decade or more. We regard legal programming as one of the last frontiers of factual television in Australia. To get to the point where we have now filmed the first murder trial in Australian history illustrates how far we have come. It would be difficult to overstate the difficulties we have encountered securing access to the courts and negotiating the myriad permissions from scores of different parties. We have been motivated on this long journey by two things; firstly, we believe there is a fundamental inconsistency in the public's right to observe the justice system in motion. We can walk into a courtroom with pen and paper to watch proceedings with great freedom. But as soon as a camera is involved the doors shut down. Surely, if a fundamental pillar of our justice system is that justice should be seen to be done, then allowing the electronic media into the courts should be a fundamental right.*

*Secondly, we are motivated as simple storytellers. There are few places where human drama plays out with as much intrigue as a courtroom. Here all our faults, foibles, misdemeanours and crimes are on display for the world to see. How society deals with these and dispenses justice is a fundamental measure of civilised society. We hope this series is the forerunner of many more on the operation of our courts.*

- Why do you think the producers encountered such resistance to filming court cases?
- What real and important concerns might the courts have had, or are courts essentially just fairly conservative institutions, resistant to public scrutiny?

- How careful is the media in Australia to observe rules about protecting the identity of people charged with crimes and that of others involved in a criminal trial?
- How do these programs allow us to see 'justice being done'?
- Have you ever attended a court case as an observer? What were your impressions of the proceedings?

Episodes 1, 2 and 5 were directed by Susan Lambert, Here is her director's statement.

*I have always loved watching courtroom dramas and reading crime, so this series was the perfect match for me. I had previously written and directed the series DIY Law with producer Ian Collie for ABC TV, so doing On Trial was a natural progression.*

*DIY Law was groundbreaking because we filmed in the Family Court for the first time ever. This time, filming On Trial in the District Court, a criminal court, was a major challenge since it also had never been done before.*

*The first challenge was getting a trial at all since it required most of the participants to agree and it had to be an interesting trial. When we finally cracked one, we had to start filming the next day. I had to trust my instincts that it would be a good trial but had no idea how long it would go for, how much access I could get to the main legal teams and whether or not it would have a dramatic turn of events.*

*This first trial went for four weeks, with the jury out for a week, so covering it so as to turn it into a compelling narrative required scripting as I went. I had to have good coverage of all the key points of the case, the main characters and a real sense of getting 'behind the scenes' so as to create a clear and dramatic story for television. Once in the edit room we realised that this first*



*trial could only be told in two episodes. The second trial I filmed gave me an opposite set of problems. It only ran for four days and I had to ensure that it could hold up dramatically for a one-hour TV episode [This is the Tofala'ao trial in episode 5].*

*The structure of a trial, with the suspense of having a verdict at the end, is a narrative gift for a director, but a gift which could have fallen over at any moment – due to loss of access or a plea of guilty and many other things – so staying alive to what was happening in the moment plus ensuring that I had the material to tell a story was a juggling act most of the time. But most interesting for me was having entre into the world of the law and the opportunity to create a series that gives an insight to that world and how it works. For me that's the achievement of the series.*

Michael Cordell, who co-produced *On Trial*, directed episodes 3 and 4, the Evans trial in Western Australia. Here is his statement.

*As a young journalist for the Sydney Morning Herald there were few things I found more fascinating than reporting on the courts. Attending the trial of the Anita Cobby killers was an experience I will never forget. It fired my desire to tell court stories later in life as a filmmaker, though little did I appreciate how difficult this would be [see the Producer Notes above]. The opportunity to direct the first murder trial ever filmed in Australia I regard as a pro-*

*found honour, and for all the difficulties I am very proud of the result. For a wide television audience to be able to sit and watch the murder trial of Anthony Evans, much as a jury would, is a profound experience. Here is a man who has admitted to slashing his de facto's throat with a hunting knife. Yet he is pleading not guilty. Was he truly insane – of 'unsound mind' – at the time of the killing? Or is he putting it on? Judging this man's guilt or innocence – rationally and in mature consideration of the facts – bears a huge weight of responsibility. Whether they agree with the jury's final verdict or not, viewers may also choose to pass judgement on the legal system. My own view after making On Trial is that, despite its imperfections, we are blessed with a legal system that bends over backwards to be fair and to deliver justice dispassionately.*

- There are many different types of court cases taking place across the country and in every state and territory every day. Given the difficulties encountered by the filmmakers in gaining permission to film these three criminal trials, are there any other types of trials you think would make for interesting and dramatic human stories if they were filmed for television?

Think carefully about trials in different courts that for a number of reasons would be difficult to film, particularly if they revealed the identity of some of the participants as these trials do, e.g. Family Law Court hearings or rape and sexual assault trials.

- How is the representation of legal argument and the behaviour of the lawyers in this program unlike much of what we see in fictionalised dramas set in courtrooms?

In what ways are these lawyers and judges quite similar to some of their fictionalised counterparts in television programs?

- Which of the lawyers did you find most impressive, whether prosecutors or defence lawyers? Which of them would you like to appear for you in a court case? Explain your choice.



# SECTION F:

## A glossary of some of the key legal terms relevant to these trials

### LAW TALK

As much of the legal system in Australia comes from the British system, transported here at the time of the First Fleet, some archaic words and terms, whether French or Latinised, are still used in courts. Such language can often be intimidating for lay people unfamiliar with these terms. This includes the jury, the accused, the victims and friends and family watching court proceedings. While television programs have created some familiarity with legal terms, the majority of programs about crime and courtrooms, such as *Law and Order*, are set in America. The United States legal system, while having some similarities in process, does not use the same terms, e.g. perpetrator instead of accused or defendant, bond rather than bail, district attorney rather than prosecutor, counsel rather than barrister or solicitor, felony rather than crime.

Here are the meanings of some of the terms relevant to these trials.

Voir dire	An ancient French phrase meaning 'to speak the truth'. Voir dire matters are usually discussed between lawyers and judge without the jury being present; sometimes referred to as 'trials within trials'.
Acquittal	A decision by a judge or jury that a defendant in a criminal case is not guilty of a crime. An acquittal is not a finding of innocence; it is simply a conclusion that the prosecution has not proved its case beyond reasonable doubt.
Bail	Person charged with a crime awaiting trial who may be released under a promise to answer the charges laid in court. Usually requires financial security and regular reporting to authorities.
Barrister	A lawyer whose main function is to represent people in court cases.
Solicitor	A lawyer who may represent people in court in some Australian states, but usually is more involved in day-to-day legal work. (In this series Theo Voros, the defence lawyer in Case 3 is a solicitor). Solicitors often appear for clients in cases heard before a magistrate. Their work may include preparing and presenting material that can be used by barristers in court.
QC	Queen's Counsel is a senior barrister; sometimes referred to as SC (Senior Counsel) or a Silk.
Brief	Written summary, often by a solicitor, of a client's case to be given to the barrister.
Convicted	To be found guilty of a criminal or illegal act
Custody	Legal confinement of an accused person
Defendant	Person accused and charged with a criminal offence on trial in a court.
DNA (deoxyribonucleic acid)	One of the new tools science has provided for the analysis of forensic evidence is the analysis of deoxyribonucleic acid, or DNA, the material that makes up the genetic code of most organisms. DNA analysis, also called DNA typing or DNA profiling, examines DNA found in physical evidence such as blood, hair, semen and even skin samples, and determines whether it can be matched to DNA taken from specific individuals. DNA analysis has become a common form of evidence in criminal trials.
Empanelled	The selection of jurors from a group of people who are called to come to court and be available for selection. Read more about challenges to members of the public called for jury service at < <a href="http://www.ipc.nsw.gov.au/lrc.nsf/pages/DP12CHP4">http://www.ipc.nsw.gov.au/lrc.nsf/pages/DP12CHP4</a> >.

# SECTION G: Australia's legal system

## THE BASICS OF THE AUSTRALIAN LEGAL SYSTEM AS IT RELATES TO THE CONDUCT OF CRIMINAL CASES<sup>1</sup>

### 1. The 'presumption of innocence' is a fundamental principle of common law.

This presumption of innocence is the right of an accused person to be considered innocent until proven guilty. A person charged with a criminal offence does not have to prove that they are innocent. They are innocent until the prosecution has proved to a court that the accused is guilty. A decision by an accused not to give evidence cannot be used as evidence of guilt.

- Why might a person accused of a crime choose not to answer any questions put to him or her?
- Should failing to answer police questions be seen as a sign that you are guilty?
- Did the accused take the stand to answer questions in any of the cases in *On Trial*?
- What impact can media reporting have on the presumption of innocence, particularly when details are released that allow people to identify the accused person?
- How are the identities of accused people disguised on television and presented pictorially in television and newspaper reports?
- How difficult is it for a jury to focus solely on the evidence at a trial and ignore media coverage, especially since publishing material on the internet is so hard to control?
- In which of these trials does information about the case and the accused's previous history threaten to end in a dismissal and/or retrial?
- What is Legal Aid? In which of these trials is it made clear that at least a percentage of the defence lawyers' services are paid through Legal Aid?

### 2. A fair trial – the adversarial system and the impartial umpire

*One of the arts of being a barrister is trying to tell a story, make it interesting, and you can only be persuasive if you do that. And I'm a great believer in agreeing as much as you can and being short and punchy and make your points. Get in, get out.*

– David Edwardson, QC,  
Senior Defence Barrister for Anthony Evans

*My strategy will be to do the prosecutor's duty of presenting all the available and reliable and relevant evidence ... and arguing the case that the accused intended to cause grievous bodily harm to the victim, which is the intent required to prove the crime of murder.*

– Paul Yovich, WA State Prosecutor at the Evans trial

*My role is to really kick on behalf of the client, that is, fit in his shoes, and fight for him.*

– Theo Voros, suburban solicitor defending Stuart Tofala'ao

In Australia there is an adversarial court system where each party is responsible for their own case. They must prepare the evidence and the arguments that they put to the court. This is done by presenting witnesses and evidence to support their case. The truth of the evidence is found through a process of questioning.

Individuals are able to represent themselves in courts but this is inadvisable in a criminal trial unless they are very confident about their ability to understand the technicalities of the law. Those unable to afford legal advice may be eligible for Legal Aid. People charged with a crime are generally represented in court by a lawyer engaged to defend them against the charges – the Defence.

The Crown, i.e. the state, is represented by the Prosecutor who puts the case against the individual charged.

A crime is an act that is legally defined as an offence against the state. Such an action is seen as injurious because it not only causes harm to individuals but also disrupts good order in the community.

Cases are heard before an impartial umpire – a judge or judge and jury, or a magistrate. The adjudicator must be like an umpire: open-minded and prepared to listen to both sides before coming to a decision. This must be based on the evidence presented in court.

A very high standard of proof is required for criminal cases as the accused may be imprisoned if charges are proved. Any reasonable doubts about the defendant's guilt as charged must result in an acquittal.

- How are the crimes we see in these trials shown to harm (a) the individuals who are victims of the accused's actions and (b) the 'good order' of the state?
- How are the crimes also shown to have harmed the accused, apart from the possibility that they may be found guilty of the offence and punished under the law?
- Research how the European system of trial, the 'inquisi-

torial system' differs from the Australian system which derives from the British legal system.

- Go to the ABC blog at <[http://blogs.abc.net.au/abc\\_tv/2011/05/peter-lavac-representing-the-defence.html](http://blogs.abc.net.au/abc_tv/2011/05/peter-lavac-representing-the-defence.html)>, where Peter Lavac, defence lawyer in Jason Courtney's trial, talks about the job of a criminal defence lawyer. Here is part of what he says:

*I don't consider the defence lawyer's role as one of establishing the truth of his client. That's the jury's function. The defence lawyer's function is to get instructions from his client and give him the best defence available based on those instructions and evidence. It's the jury's role to then determine whether he's guilty or not-guilty.*

What do you think?

- What duties does the judge have to all people in the court, apart from acting as an umpire? Give some examples from the trials that demonstrate some of the judicial responsibilities.



### 3. What is evidence?

There are rules of evidence which set out the legal process for proving or disproving the facts of a case. These are designed to ensure that everyone is treated fairly in a court hearing. Only the most reliable evidence should be presented. Witnesses generally give spoken evidence in court in response to questioning. Anyone can be called to give evidence in a court case. If someone refuses to go to the court they can be subpoenaed (summoned to appear at court). Some people are subpoenaed as a matter of course – police officers, public servants and local government officials – because they are supposed to be impartial. If they were to willingly attend court to give evidence, they could be seen as favouring one side or the other.

Rules of evidence include:

- Witnesses can't be asked leading questions, such as one that suggests a correct answer, a bit like a rhetorical question, e.g. Mr Jones struck his partner very hard, didn't he?
- Witnesses can only give statements of fact, not opinions, unless they are recognised by the court as 'an expert witness'. You can't speculate about a person's psychological state unless you are a psychologist or similar.
- You can't refer to 'hearsay' such as an account you heard second-hand.
- A defendant can't be forced to give evidence.
- Evidence should be relevant to the case and be legally obtained.
- What difficulties are shown or referred to in any of these trials that demonstrate how easily the rules of evidence can be disrespected, disregarded or not understood?
- Is one form of evidence any more reliable or important than any other, i.e. is forensic and scientific evidence (such as DNA or fingerprints), CCTV camera footage, or personal witness statements necessarily more likely to be useful to the jury?
- If expert witnesses are called by either the defence or the prosecution, what can reasonably be assumed about how their evidence is likely to support either the prosecution or defence case.

### 4. The jury system

*For the next couple of weeks can you put a bubble around yourself in respect of this case ... no tweeting, Facebook walls or anything else.*



*The judge's principal role really is to ensure as far as possible that the accused and the state both have a fair trial.*

– Justice John McKechnie  
addressing the jury in the Evans trial.

The use of a jury system goes back to Medieval times in twelfth century England. However it is believed that juries, often made up of groups of citizens, decided legal cases in Ancient Greece. While the composition of the jury has changed over time and differs from country to country, the essential jury role remains unchanged. The basic principle is that we all have a right to be judged by our peers.

The jury's main task is to determine the guilt of a person being tried, solely on the basis of the evidence presented in court. It is an obligation of all citizens to be prepared to do jury duty if and when they are called. Some occupational groups such as emergency services personnel, doctors, lawyers, police officers and priests are ineligible; people over 65, women with young children and some teachers can be exempted. In most cases juries are expected to return a unanimous verdict (12 out of 12) or majority decision (11 out of 12). In murder trials the verdict must be unanimous.

Once a jury has been selected they must take an oath of affirmation (a solemn promise) to carry out their job conscientiously. The jury must also select a foreperson to act as chair and spokesperson in court. The jury's role is to listen carefully to all evidence and reach a decision. They may take notes and ask the judge for clarification of points of evidence and law. Deliberations must be confidential and in most jurisdictions in Australia it is an offence for a juror to

disclose what took place in the jury room.

- Outline why some occupations and certain categories of people in some situations may be exempted from sitting on a jury?
- Who might be disqualified from serving on a jury?
- On what grounds might lawyers from either side object to jurors simply on the basis of appearance?
- Approximately how long does each jury take to reach verdicts in these three cases?
- In which trial is evidence of distress and tension apparent within the jury?
- What do we see of challenges by lawyers to people called up for jury duty? On what basis might lawyers want to make such challenges?
- Did any of the decisions of the jury surprise you as an outsider observing these trials?
- In any of these cases did you think that the arguments of either the prosecutor or the defence lawyer were better presented and therefore strongly affected the final verdict?
- What are some other factors that may influence the decisions of a jury?

# Section H:

## Links and bibliographical reference materials

### USEFUL LINKS TO RELEVANT WEBSITES

District Court of NSW:

<http://www.lawlink.nsw.gov.au/dc>

Supreme Court of Western Australia:

<http://www.supremecourt.wa.gov.au>

Law Society of NSW:

<http://www.lawsociety.com.au>

NSW Bar Association:

<http://www.nswbar.asn.au>

Criminal Law Survival Kit by John Stratton:

<http://www.criminallawssurvivalkit.com.au>

Find Legal Answers:

<http://www.legalanswers.sl.nsw.gov.au/resources.cfm/generalID/25/subjectID/104/>

Redfern Legal Centre's lawyers practice manual

By Rees Neil, LawBook Company

<http://www.legalanswers.sl.nsw.gov.au/organisation.cfm/organisationID/362>

### SIX KEY BIBLIOGRAPHIC REFERENCES IN ANY MEDIA (BOOK, FILM OR WEB)

#### (1) *The Staircase*

A documentary series made in 2004 by Jean-Xavier de Lestrade; DVD distributed by the Sundance Documentary Collection.

Filmmaker Jean-Xavier de Lestrade chronicles the story of North Carolina author Michael Peterson, who stood trial in 2003 for the murder of his wife. Granted access to Peterson's lawyers and his immediate family, de Lestrade portrays a high-profile murder trial from the inside.

#### (2) *Murder on a Sunday Morning*

A documentary made in 2001 by Jean-Xavier de Lestrade.

In 2000, tourist Mary Ann Stephens was murdered in Florida. Brenton Butler, a local fifteen year old, was arrested and tried for murder. The Prosecution's case relied heavily upon a positive identification made by the victim's husband. The film follows Butler's defence team as they defend him from a police department determined to prosecute.

#### (3) *Paradise Lost: The Child Murders at Robin Hood Hills*

Made in 1996 by Joe Berlinger and Bruce Sinofsky (Warpfilms)

Filmmakers Joe Berlinger and Bruce Sinofsky explore a criminal case with complex strands. When the mutilated corpses of three eight-year-old boys are found near a wooded stream in West Memphis, suspicion falls on a trio of young men, Jessie Miskelly, Jason Baldwin and Damian Wayne

Echols. Stories that the men listened to hard rock music and fashioned themselves as Satanists fuelled speculation of their involvement in the crime.

#### (4) *Audio-Visual Coverage of Courts – A Comparative Analysis* (book)

By Daniel Stepniak, Cambridge University Press, Cambridge UK, 2008.

#### (5) *Documentary series made by Hilton Cordell & Associates:*

Producers:  
Ian Collie and Michael Cordell

##### (i) *DIY Law*

ABC TV, 2001.  
Director/writer: Susan Lambert

*DIY Law* is an observational series following a number of self-litigants on their journey through the labyrinthine judicial system. With the increasing cost of professional help and with cutbacks to legal aid, more and more people have no choice but to represent themselves. They are taking the law into their own hands – Do It Yourself Law.

##### (ii) *A Case for the Coroner*

ABC TV, 2003.  
Director/writer: Hugh Piper

*A Case for the Coroner* takes a behind-the-scenes look at the office of the NSW State Coroner covering five inquests conducted by coroner John Abernethy as well as the forensic nightmare created by the Bali bombings in October 2002.

##### (iii) *Suspicious Minds*

Nine Network, 2006. Directors: Kay Pavlou, Andrew Sully and Lisa Potasz.

A series examining forensic process and procedures inside the State Coroner's Office of Victoria.

#### (6) Articles

<http://www.theaustralian.com.au/business/opinion/battle-for-electronic-medias-court-access-a-beneficial-development/story-e6frg98f-1225916783417>

<http://www.theaustralian.com.au/business/legal-affairs/us-to-put-court-videorecordings-on-trial/story-e6frg97x-1225925016930>

#### OTHER REFERENCES AND RESOURCES USED BY THE WRITER OF THIS GUIDE

ABC Television website for the series which includes a link to barrister Peter Lavac's interview and background information including director and producer statements:

<http://www.abc.net.au/tv/geo/documentaries/interactive/ontrial/>

NSW Law Reform Commission site with information about the jury in a criminal trial:

<http://www.ipc.nsw.gov.au/lrc.nsf/pages/DP12CHP4>

Reviews of several books about reality television:

<http://screen.oxfordjournals.org/content/47/1/133.full.pdf+html>

Transcript of 'Truth just ain't entertaining', Ben Pobjie's article about reality television:

<http://m.smh.com.au/entertainment/tv-and-radio/truth-just-aint-enter-taining-20110715-1hhhn.html>



#### Endnote

<sup>1</sup> Much of this information is drawn from material included in *Civics and Citizenship: Unit 3 – Rights and Responsibilities*, Victoria Law Foundation, 1997, written by Jules Aldous, revised by Alison Schuelter.

This excellent set of four booklets was widely distributed to schools but now may only be available in school or other libraries. These libraries are listed at the National Library of Australia Trove site <<http://trove.nla.gov.au/work/8981687?>>.



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