THE JURY SYSTEM

by John Walker and Desmond Lane

The system of trial by jury has changed considerably since it was first introduced into thirteenth century England to replace the old system of trial by physical ordeal. In recent years, there has been an intense debate about whether the jury system should be further changed or even abolished altogether. Criticism of trial by jury often arises after a decision in a particular controversial case, in a climate where rational discussion about the general merits of the system is unlikely to occur. In such circumstances, logical arguments are often reduced to simple slogans for the media. The aim of this paper is not to argue the case one way or the other, but simply to give some structure to the arguemnts for and against the jury system and to put them as fairly as possible.

Procedures for jury trials

In Victoria, juries can be used in the trial of both criminal and civil cases. All criminal offences against the law of Victoria or the law of the Commonwealth are divided according to whether they can be heard by a jury. *Indictable* offences are those which can be heard by a jury and *summary* offences are those which cannot. Indictable offences may be created by the common law (for example, murder) or by the State or Federal Parliament (for example, importing or trafficking prohibited drugs). Indictable offences usually carry heavier maximum penalties than summary offences. Amongst the most common indictable offences are murder, manslaughter, intentionally causing serious injury, rape, indecent assault, robbery, theft, burglary, kidnapping and drug trafficking.

Many indictable offences can be heard *summarily* (that is, by a magistrate rather than a judge and jury). Generally, the consent of both the *defendant* (the person charged with the offence) and the prosecution is required for this to occur.

If a person is charged with an indictable offence and the case is not determined summarily, the case will normally come before a magistrate prior to trial for a preliminary hearing (known as a *committal proceeding*) to determine whether the evidence is sufficient to put the person on trial. If the magistrate decides that it is, the defendant is committed for trial in either the Supreme Court or County Court. The Director of Public Prosecutions (DPP) for the State or the Commonwealth (as the case may be) then decides whether the case should proceed and, if so, files a *presentment* (for State charges) or *indictment* (for Commonwealth charges). The presentment or indictment lists the charges (known as *counts*) against the accused person. If the accused indicates that s/he intends to plead not guilty to any of them, a jury is *empanelled* (that is, selected) and a trial held to determine whether or not the accused is guilty.

A jury in a criminal trial usually has twelve members. For a long trial a jury of up to fifteen can be empanelled so that the trial will not be aborted if some of the jurors become ill.

There are several limitations on the use of jury trials in *civil* cases. First, juries may only be used in relation to proceedings in the Supreme Court or the County Court, not the Magistrates' Court, the Federal Court or other courts. Second, a jury trial may only be held in certain types of civil cases. Third, a case can only be tried by a jury if one party or the other so requests and pays the appropriate fees. Fourth, the Court itself may direct that the trial not be held before a jury, despite the wishes of the parties. A jury in a civil trial has six members.

Special jury cases

Apart from civil and criminal trials, juries can be used in other special circumstances :

- A jury may be empanelled to sit with a coroner to determine the cause of a person's death;

- If an accused person appears to be insane,or for some other reason unable to understand the nature of the trial, a jury may be empanelled to determine whether s/he is fit to enter a plea (that is, guily or not guilty) to the charges s/he faces and whether s/he is fit to properly defend the charges. If the accused is found unfit to plead, s/he may be detained "until the Governor's pleasure is known" - that is, indefinitely;

- Before being asked whether s/he pleads guilty to a presentment or indictment, anaccused person may raise a special plea. Examples are a plea that the Court does not have jurisdiction to try the charges, or that the accused person has already received a Royal Pardon for the offence, or that s/he is

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not the person named in the presentment or indictment. A jury is then empanelled to determine the issue;

- If a person is committed for trial in the Supreme Court or County Court, the Director of Public Prosecutions may decide (usually because the evidence is insufficeint) that the case should not proceed. S/he then files a *nolle prosequi*, a document indicating that s/he does not wish to proceed with the case. A person aggrieved by the decision of the DPP, or by the decision of a magistrate not to commit a person for trial, may apply to the Full Court of the Supreme Court for an order that a grand jury then be empanelled. If the Court makes such an order, a panel of 23 jurors is assembled. The grand jury then questions witnesses itself and determines whether it considers the evidence sufficient to justify the case proceeding.

All of these procedures are used very rarely and no more need be said about them in this paper.

Role of the jury in a trial

Fact-finding

The function of the jury is to make findings of fact on the issues arising in the case and to apply those facts to the law as explained to them by the judge. Suppose, for example, a person sues a newspaper for libel. The judge will explain to the jury the law of defamation as it applies to the circumstances of the case and the jury applies that law in determining whether, on the balance of probabilities, the plantiff has in fact been defamed, and if so, what damages should be awarded. In criminal cases, the question for the jury is whether, on the admissible evidence presented to it, it is satisfied beyond reasonable doubt that the accused person is in fact guilty of the crime with which s/he is charged. To assist the jury, the judge will explain to them what the prosecution must prove - for example, the various legal elements of the crime of murder.

Complex rules govern the conduct of jury trials. In appropriate cases, the judge must warn or direct the jury about the use to be made of particular pieces of evidence. For example, if two accused persons are tried together, the judge must direct the jury that a confession said to have been made by one of them may not be used as evidence against the other. In a case involving identification of an accused person by an eye-witness to the crime, the judge must warn the jury about the risk that the eye-witness may have been mistaken. Often the

the law in a misleading or inaccurate way, the verdict of the jury may be overturned by an appeal court.

Deliberations and verdict

While the judge's directions to the jury are a matter for the public record, and can be assessed accordingly, the deliberations of the jury are a matter of strict secrecy. Indeed, it is an offence in Victoria to disclose the deliberations of a jury. In a civil case, the jury's verdict is usually delivered in the form of answers to specific questions framed by the judge, such as, "were the plaintiff's injuries caused by the negligence of the defendant?" In criminal cases, the jury's verdict will simply be that the accused person is guilty, not guilty, or not guilty on the grounds of insanity of the particular offences with which s/he is charged.

Unanimity / Majority Verdicts

At common law, jury verdicts in criminal trials had to be unanimous. This rule is very old : it was clearly established in 1367. In 1993, the High Court (in the case of *Cheatle*) held that unanimous verdicts were such a fundamental feature of criminal tirals that a law in South Australia which qualified the rule was unconsitutional, because it breached the guarantee in the Constitution that the trial of a serious Commonwealth offence "shall be by jury". In the course of its judgment, the Court said,

> "The necessity of a consensus of all jurors, which flows from the requirement of unanimity, promotes deliberation and provides some insurance that the opinions of each of the jurors will be heard and discussed. Thereby, it reduces the danger of "hasty and unjust verdicts."

However, the constitutional guarantee of unanimous verdicts applies only in the trial of *Commonwealth* offences. Despite the High Court decision, in 1993 the Victorian Government amended the law to provide for majority, rather than unanimous, verdicts in trials for most *State* offences. Except in cases of treason or murder, if the jury cannot agree on a verdict after six hours of deliberation, it may now reach a verdict by a majority of 11 to 1.

If the jury cannot reach agreement (unanimously or by the required majority) after a reasonable period of time, the jury will be discharged and the case will be retried. A jury which cannot reach agreement is known colloquially as a "hung jury". This happens, surprisingly, infrequently. In more than 97 per cent of cases, juries agree unanimously

civil cases, a jury may reach its verdict by a majority of 5 to 1.

Jury trials in perspective

Although we think of juries as a central feature of our legal system, they are used in only a very small proportion of cases. Out of the more than 120 000 criminal cases heard by the courts each year, juries are used in only about 450, or about 0.37 per cent. The proportion is similalry small in civil cases. There are two reasons for this. First, most cases (civil and criminal) are heard in the Magistrates' Court, where juries are not available. Second, juries are used in only a small proportion of the cases in which they could be used.For example, most people charged with an indictable offence waive their right to trial and consent to the case being heard by a magistrate. Even in cases in which the defendant or (more usually) the prosecution insists on the case being heard in either the Supreme Court or the County Court, over two-thirds of defendants plead guilty. As a result, a jury is not empanelled.

Advantages and disadvantages of the jury system

Trial by jury is only one of many possible means of adjudicating serious cases. In most of Europe, for example, serious cases are determined by one or more *judges*, without any participation from people outside the legal process.Even in our system, most cases are determined by a judge or magistrate alone; s/he must resolve both the question of *fact* and issues of *law* arising in the proceedings. Some tribunals (such as the Administrative Appeals Tribunal) are constituted by a *person with expertise* in the subject matter of the case (such as town-planning) or by *lay persons* with some standing in the community, usually with a lawyer presiding. Any of these courts and tribunals may be called upon to resolve legal and factual questions just as complicated as those which arise in a jury trial.

There are many arguments about the merits of trial by jury as against one or other of these alternatives. However, the arguments tend to cluster around three main issues :

- the quality of jury decision-making;
- the efficiency of juries; and
- the political and social value of the jury system.

Although the issues overlap, it will be convenient to discuss them under each of these headings.

Quality of jury decision-making

standing. Barristers and solicitors must have a university degree in law and meet the Supreme Court's requirements for admission to practice. The law itself is sufficiently complex and intimidating that litigants in civil proceedings and accused persons in criminal proceedings generally engage a lawyer to act on their behalf. Many of the litigants themselves are "repeat players" such as insurance companies and government agencies, who have an intimate knowledge of how the system works. Many of the witnesses are people whose jobs involve a large degree of contact with the legal system, such as police, forensic scientists, clinical psychologists and certain doctors. The rules of law themselves stress expertise : for example, a witness may not express an opinion on a matter unless s/he is qualified by training, experience, or other expertise to do so. If anything, the emphasis upon expertise and professionalism in the legal system has increased in recent years and lawyers themselves are increasingly specialising. Specialist tribunals have been established to deal with particular types of disputes and, in the Magistrates' Court, lay justices can no longer sit. Magistrates must now be qualified legal practitioners.

Three factors underlie these trends :

- the increasing complexity of the cases coming before the courts;
- The increasing complexity of the law applied in such cases; and
- a general social trend towards greater professionalisation and specialisation.

Critics regard lay juries as an anachronism in a legal system - indeed, in a society - which increasingly emphasises expertise and professionalism :

> "Twelve strangers, pressed into service, ignorant of the rules of evidence, unfamiliar with court procedure, inexperienced in the cut and thrust of cross-examination, mesmerised by the eloquence of counsel and over-awed by the whole experience, are required to reach unanimous agreement on complicated matters of fact".
> (former Chief Commissioner of the Victoria Police, Mr Mick Miller)

Critics like Mr Miller contend that the general inadequacies of juries are particularly highlighted in complex cases such as major fraud trials where the volume and sophistication of the evidence is so great as to be beyond the understanding of ordinary people. It was in response to such criticisms that the Roskill Committee in Britain recommended in 1986 that major fraud prosecutions be heard by a special tribunal

The proposals of the Roskill Committee, however, met strong opposition. The National Council for Civil Liberties in Britain argued that fraud trials were no different in principle to any other type of trial. The Council argued that although a large volume of evidence may have to be assessed, the ultimate question to be determined in a fraud trial was, in plain terms, whether there had been a swindle. This assessment could only be made by reference to community standards of dishonesty and those standards could best be determined by people selected at random from the community at large - that is, a jury.

In most cases, the key questions for determination do not concern community standards but rather are questions of fact - such as whether the accused was the person who robbed the bank, or whether the accused knew there was heroin in her suitcase. The process of fact-finding is something each of us does every day: we gather pieces of information together, draw inferences from them based upon our experiences, our prejudices and our processes of deduction, we then draw conclusions and we act upon those conclusions. A jury operates in a similar way, except with twelve (or six) minds rather than one. When twelve people come together as a jury (or six in a civil case) they can pool their experience and skills in assessing the evidence presented. Can we be sure that an alterantive fact-finding tribunal (such as a panel of judges or a judge sitting with two experts) would have more commonsense, more accum-ulated experience or a greater capacity for reliable deduction than a jury?

Of course, in any particular case, a jury may consist of twelve narrow-minded, stupid, or prejudiced people. Indeed any group of people may hold common prejudices. A striking example occurs in rape cases in which the accused claims that the victim consented to sex with him. Feminists argue that the tactics of defence counsel in such ases are often aimed at appealing to stereotyped views of women. Victims are often subjected to cross-examination about matters like their mode of dress, on the assumption that the jury will believe that a woman who was dressed in a "provocative" way must have consented to sex. Until recently, a victim could also be subjected to cross-examination about her prior sexual history, on the assumption that a more sexually active woman was more likely to have consented to sex on the occasion in question. This practice became so prevalent and so intimidating that, following an outcry from women's groups, Parliament was forced to intervene to limit the scope of such cross-examination.

There is, then, the risk that a jury will draw on its

of fact may also apply a bigoted or narrow-minded approach? Perhaps there is less likelihood that twelve (or six) people will adopt such an approach than a panel which is made up of only one or three members. While the members of a jury may each have their own prjeudices, it is unlikely that they will be uniform prejudices unless they reflect an attitude which is widespread in the community. A narrow-minded community may well produce a narrow-minded jury; but then perhaps it will also produce narrow-minded judges.

Whether or not jury members hold more or fewer prejudices than judges or other people who might constitute an alternative tribunal of fact, it is sometimes contended that the *procedures* applied in jury trials are not conducive to rational decision-making. Generally speaking, jurors must sit passively as the evidence is presented to them. They do not ask questions of witnesses or of counsel, nor can they request that additional evidence be presented to them. By contrast, a judge sitting alone can do most of these things; as a result, ambiguities in the evidence can be remedied and misunderstandings that the judge might have can be dispelled before s/he considers a verdict. Furthermore, if a judge makes a finding of fact, s/he is obliged to give reasons for that finding; any errors in his or her reasoning are therefore available and can be subjected to the scrutiny of an appeal court. In a jury trial, due to the strict secrecy requirements, no-one knows whether the jury understood the evidence, drew justifiable inferences from it or applied the facts correctly to the law. Courts cannot correct situations in which persuasive or brash individuals override quieter but more logical jury members.

Certainly there are cases in which close observers regard the jury's verdict as "perverse". However, claims of "perverse" results are uncommon and even in such ases, one may ask whether the criticism necessarily means that it is the jury which is wrong. It is significant that most judges and other lawyers of considerable experience in the conduct of jury trials retain a great deal of faith in the jury system.

There have, however, been a few cases in which a miscarriage of justice has been shown to have occurred. The convictions of Lindy and Michael Chamberlain are an example. The Chamberlains were convicted by a jury and Mrs Chamberlain spent several years in prison before a Royal Commission was established to enquire into the case. The Royal Commission concluded that they were innocent and their convictions were eventually quashed. It should be noted, however, that in that case, as in many cases involving a miscarriage of justice, appeal court judges expressed the view that

Chamberlains been tried before that judge rather than by a jury it seems unlikely that the result would have been any different. The same may be said of a number of other recent cases, such as the trials involving the Birmingham Six and the Guildford Four in England. Miscarriages of justice can occur in any system.

Efficiency of juries

Jury trials are very expensive. The Shorter Trials Committee estimated in 1985 that a criminal trial cost $7200 per day in the Supreme Court and $5500 per day in the County Court.The costs have undoubtedly increased substantially since then. Most of these costs result from the fees paid to solicitors and barristers, the expenses of witnesses and the costs of providing judges, court staff, court reporters and courts. The fees paid to jurors and the other costs of providing a jury are a relatively small component of the overall costs. However, trials involving a jury do tend to take longer than trials before a judge alone. This is because extra time is taken up in the presentation of evidence to the jury in a simple form, in addresses by counsel to the jury, and in directions by the judge to the jury. Additional costs are also involved in cases in which a re-trial is required because the jury is unable to reach a verdict or because the verdict is overturned by an appeal court. Since trials before a jury take longer and need to run without interruption, it is often argued that they contribute to the already substantial delays in the hearing of criminal and civil cases.

These costs and delays, however, need to be kept in perspective. The existence of the jury system is not a major reason for the delays in the hearing of cases nor is it the major reason for their costs. Inquiries into the costs and delays in the legal system have tended to focus on other problems such as inadquate court resources, excessive costs of legal services, and overly complex rules of procedure and evidence. In any event, the additional costs which result from the use of juries must be weighed against the benefits which result from their use.

Political and social value of juries

The stronger arguments made for the retention of juries concern their political and social value. Social institutions tend to operate most democratically when they are accountable and when ordinary members of the community have a substantial role to play in them. For example, various inquiries have found that rights of access to Government documents, rights to challenge decisions made by bureaucrats and ministers, and requirements for departments and other public

that the participation of ordinary people in an important part of the legal system makes the system in general operate more openly and with greater public confidence.

Each year, about 6000 people in Victoria serve on juries. For many it is an arduous and emotionally demanding experience. At present, jurors are paid only $36 per day for the first six days they attend and $72 for each subsequent day (in the rare case in which the jury service runs for more than 12 months, the rate rises to $144 per day). Although employers must make up the wages of employees who serve on a jury, employers and self-employed people are often left out of pocket.

In some court-houses, the facilities for juries are so cramped and uncomfortable that it is hard for jury members to concentrate properly on their task. In long trials the disruptions which may be caused to a person's day-to-day life are very substantial indeed. Despite these shortcomings, however, many people find jury service, like other contributions to the community, a rewarding experience. Many consider it an interesting insight into the operation of the law and for some it reinforces their faith in our social institutions.

The involvement of non-legallly qualified people can be seen as particularly important in a system in which the key players themselves are drawn from a narrow section of society. In Victoria, for example, no woman has ever served as a judge of the Supreme Court and only three women have ever served on the County Court. Very few judges from aboriginal or non-English speaking backgrounds have ever being appointed. Indeed, the typical judge in Victoria is a man from an upper-middle class, Anglo-Celtic background who has been educated at a private school and who is of broadly conservative disposition, even though such people form a very small segment of our society. This is not to say that judges are incapable of deciding cases fairly merely because the witnesses or parties differ from them in sex, class or ethnic origin; but the involvement of people from all walks of life provides reasons for greater confidence in the fairness of the legal system. Many believe that society is more likely to accept the verdict of a jury than the verdict of a judge. The late Mr Justice Lionel Murphy once said that "the jury is a strong antidote to the elitist tendencies of the legal system".

Are juries representative?

If, however, juries draw their political and social legitimacy from representing the whole community, does it matter that their composition (in terms of age, occupation, ethnic background, class and so

right to be excused. As a result, in practice, juries never include lawyers, doctors, dentists, priests, senior public servants, police, Members of Parliament, non-English speakers, people who have been in prison or who are undischarged bankrupts, to name just a few. Many argue that, if a jury is to provide a true cross-section of the community, then it should include such people.

The composition of the jury in a criminal trial can be further altered by the Crown or the accused person objecting ("challenging") to prospective jurors in the process of selection, without giving any reason. Where one person is on trial, the Crown and the accused person may each challenge up to six people. (If the accused are on trial together, they each have five challenges and the Crown has ten).Some people criticize this practice, while others think it should be extended, because they believe that if a jury is truly to be composed of one's "*peers*", then we should make greater efforts to match the characteristics of the jury (such as sex, age, occupation, place of residence, ethnic origin, class and so forth) to those of the accused person. On the other hand, the celebrated trial of former Queensland premier Sir Joh Bjelke-Petersen in late 1991 raised concerns about some jury members being *too* similar to the person on trial, in the sense of having close political affiliations to him. The United States system of jury selection could have prevented this problem, as it allows for detailed questioning of the backgrounds of individual jurors prior to their being allowed to serve. The advantage of such a system is that it can ensure an appropriate jury; the disadvantages are that it can cause additional delays and costs in the hearing of cases and it can undermine the random nature of jury selection.

Arguments that juries are unrepresentative had greater force when women were totally excluded from jury service, which in Victoria was until 1964. Nowadays, while juries still do not provide a neat cross-section of society, they can be said to be broadly representative of the community in the sense that their composition by age, class, gender and other variables is very diverse.

Applying community standards

Many jury cases involve value judgements in which the standards of the community need to be applied. For example, in determining whether a person has been negligent it is necessary to assess whether the person has met the standard of care reasonably expected of him or her by the community. In determining whether a person killed another as a result of provocation (and is therefore guilty of manslaughter rather than murder) it is necessary to determine whether a reasonable person in the

person's reputation in the eye's of reasonable people. It is often argued that, since it represents society as a whole, the jury is best placed to make decisions such as these.

In many important instances, however, juries have reached a verdict according to their instinctive feelings about what is fair and in doing so have refused to apply the law in the way in which a judge has directed them to do. A recent example was the Ponting case in England in which a public servant was charged with an offence under the Official Secrets Act after he gave a Member of Parliament secret documents about the sinking of an Argentinian ship during the Falklands War. Mr Ponting believed that the British Navy had acted wrongly in sinking the ship and that the public had an interest in finding out the truth about what had happened. Although it was widely believed that Mr Ponting had technically committed an offence in "leaking" the documents, the jury refused to convict him. Many observers considered that the jury reached this view because it felt the prosecution or the law itself to be unfair. Opinions differ about whether it is a good thing that a jury should act in this way. Some argue that the jury's sworn duty is to uphold the law, regardless of whether it considers the law itself to be unfair. Others, however, argue that such cases represent a triumph for justice over law and that they show how the jury can stand between the citizen and an unjust law. Indeed, refusal by juries to convict has sometimes led to changes in the law. For example, the offence of culpable driving resulting in death was created because juries were reluctant to convict drivers of the more serious offence of manslaughter. The decisions of the juries also contributed to the abolition of the death penalty for murder and other offences.

While some would argue that it is for the elected representatives of the community as a whole - that is, Parliament - and not for twelve randomly chosen people to make changes to the law, others point out that even fairly and democratically elected Parliaments may (and do) pass harsh and unfair laws. Indeed, such laws may, at any particular time, have the support of the majority of members of the community. If our society continues to place a high value on the individual, the jury system may be an important protection for the individual against the tyranny of the majority.

Questions for classroom discussion

1. Do you know of any person who has served on a jury? Ask him/her what the experience was like. Did it change his/her views about the system of justice? Whould this person choose jury trial if faced with a serious charge or if s/he had an important civil claim?

2. In criminal cases, the jury's function is purely to determine whether or not, on theevidence that is presented to it, the accused person is guilty of the offence with which s/he is charged. Do you think that if a person is convicted of an offence, the jury should also have a role in determining the sentence to be imposed?

3. Do you support or oppose the introduction of majority verdicts in trials for most State offences? Why?

4. Do you think that the processes by which juries are selected should be reformed? Should the categories of people who are disqualified from or are ineligible for jury service, or who may be excused from jury service, be narrowed? Should the existing system whereby challenges can be made agaisnt juroirs, wihtout explanation, be abolished? Or should new procedures be set up for investigating in detail the backgrounds of jurors before they are allowed to serve?

5. Do you know of any other cases where a jury verdict has been seen as "a triumphfor justice over law"? Do you agree with the jury verdicts in these cases?

6. The Constitutional Commission recommended in 1987 that the right to trial byjury for serioius State offences should be enshrined in the Constitution, as it is for serious Commonwealth offences. Do you agree?

7. Imagine you are a Koori. You have been charged with burglary. The police say that you broke into a house and stole a video recorder. You are innocent; in fact you were with your brother at the time of the offence. He has told the police the truth but they do not believe him because he has been in trouble with the police before. At the request of the police you participated in an identification parade and an eyewitness to the crime identified you as the burglar. You were crushed by this and when interviewed by the police you agreed with everything they put to you about the crime. The interview with the police has been tape-recorded.

You are now before the Magistrates' Court. The police want to have the charge heard summarily (that is, by a magistrate). Whould you consent to a summary hearing or would you choose trial by jury? Why?

Suggestions for further reading

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