

PERCEPTIONS OF THE CIVIL JURY SYSTEM

JACQUELINE HORAN*

I INTRODUCTION

There is an Australia-wide trend of reducing the right to civil jury trial.¹ In criticising this trend, Justice Priestley of the New South Wales Supreme Court observed that:

The reason always given in support of this trend is that it is cheaper and more efficient to do away with juries. Even if this be so, of which I am not convinced, the reason misses the main point of juries, the spreading of power within the community. The more widely spread the exercise of legal power is, the healthier, it seems to me, to be.²

Justice Priestley's observation identifies two of the most common arguments used in the debate surrounding the contemporary relevance of the civil jury system.³ First, it is argued that civil jury trials are too costly and inefficient (the costs argument). Whilst many State parliaments have relied upon the costs argument to reduce the use of civil juries, there are many experienced judges who would join with Justice Priestley in disputing this assertion.⁴ Both sides of the argument rely on anecdote and personal opinion, as there is no factual basis for either point of view. Review of the empirical research into civil juries in Australia shows that there has never been any statistically valid research published in Australia addressing the costs argument. It is notable, however, that an overseas empirical study addressing the costs argument did not demonstrate conclusively that civil jury trials cost the government more than trials by judge alone.⁵

A second common argument, and one that favours retaining juries, is the argument identified and endorsed by Justice Priestley that spreading legal power

* Lecturer, Faculty of Law, the University of Melbourne; member of the Victorian Bar.

¹ The right to a civil trial is abolished in South Australia: *Juries Act 1927* (SA) s 5. In Western Australia, the right to a jury trial is restricted to claims of defamation, fraud, malicious prosecution, false imprisonment, seduction or breach of promise of marriage: *Supreme Court Act 1935* (WA) s 42. See generally James Crawford, *Australian Courts of Law* (3rd ed, 1998) 69; and James Crawford and Brian Opeskin, *Australian Courts of Law* (4th ed, 2004) 83.

² Ian Barker, *Sorely Tried: Democracy and Trial by Jury in New South Wales* (2003) 29.

³ Jacqueline Horan, *The Civil Jury System: An Empirical Study* (PhD Thesis, Monash University, 2004)

⁴ See, eg, *Gerlach v Clifton Bricks Pty Ltd* (2002) 188 ALR 353, where both Hayne and Callinan JJ disputed Counsel for the appellant's assertion that 'everyone accepts [that jury trial] will take longer' and that 'there is a universal benefit in getting rid of the jury in terms of brevity and efficiency ...': at 357. Justices Gaudron, McHugh and Hayne found this to be a 'startling proposition' at 356. Justice Hayne argued that the taking of evidence is commonly performed 'with greater celerity than it is before a judge' and the while the proposition that everyone knows that jury trials take longer is 'a good piece of LORE, I am by no means certain that it is at all warranted in fact or in LAW.' Callinan J agreed with Hayne J's observations.

⁵ Ontario Law Reform Commission, *Report on the Use of Jury Trials in Civil Cases* (1996) 27.

within the community is healthy for a community because citizen participation in the legal system promotes legitimacy of the legal system (the legitimacy argument).

As a result of the most recent reduction of the right to a civil jury in NSW,⁶ most Australian civil jury trials are now conducted in Victoria. Some critics of the legitimacy argument find it hard to believe that Victoria will not follow suit.⁷ They argue that the movement away from civil jury trials in the UK and elsewhere in Australia has not resulted in a crisis of community confidence.⁸ Further, it can be argued that the civil jury is not necessary to promote the legitimacy of the legal system as the criminal jury adequately fulfils this role.

However, no research has been undertaken that monitors the effects of the reduction of the right to civil jury trial in any jurisdiction that has severely limited the right. And as Ian Barker QC observes, politicians appear not to have considered whether the escalating insurance crisis that NSW has experienced in recent years is a result of the diminution of jury trials in that jurisdiction.⁹ Conversely, there is no evidence that the civil jury system does engender greater community confidence by spreading legal power within the community. The legitimacy argument suffers from a lack of factual understanding.

Whilst both the costs and legitimacy arguments are both in need of further analysis and research, this article will focus on the legitimacy argument. It will explore the importance of the civic experience of jury service to today's society. The level of importance the jury has assumed in contemporary Victorian society will be explored in three ways.

First, the historical underpinnings of the civil jury system are discussed. Commentators throughout the centuries have linked the jury with the development of our democratic community. Their opinions offer us insight into the ever-changing community role of the civil jury over time and how this has influenced contemporary attitudes towards the civil jury.

Secondly, the place of the civil jury system in a contemporary democratic community will be discussed. John Hale believes that 'the community regards the right to trial by jury as a valuable right'.¹⁰ The basis for this belief will be explored.

The third way in which the legitimacy argument will be analysed is by reference to an empirical study. Given the lack of factual understanding of the legitimacy

⁶ The *Courts Legislation Amendment (Civil Juries) Act 2001* (NSW), which commenced operation on 18 January 2002 amended the *District Court Act 1973* (NSW), the *Supreme Court Act 1970* (NSW) and the *Defamation Act 1974* (NSW). The effect of the new sections in these three Acts is to reduce the right to civil jury trial in that State.

⁷ Crawford and Opeskin, above n 1, 82.

⁸ *Ibid* 83.

⁹ Barker, above n 2, 31.

¹⁰ John Hale, 'Juries: The West Australian Experience' (1973) 11(2) *University of Western Australia Law Review* 99, 102.

argument, the author conducted an empirical study of the Victorian civil jury system in 2001. The aim of the study was to produce some basic empirical information that would lead to an informed debate about the role of the contemporary civil jury.

In the analysis of the empirical results, particular emphasis has been placed on the perceptions of the civil jurors about the civil jury system. Due to jury room secrecy provisions, which have previously prevented researchers obtaining access to the opinions of Australian jurors, little is known about jurors' perceptions of the civil jury system. However, through the empirical study considered in this article, an academic researcher has been given access to civil jurors to obtain their views of the civil jury system for the first time in Australia.¹¹ This empirical analysis will also compare and contrast some of the views of the civil jurors with the views held by Victorian civil jury trial judges and their court staff.

In the final part of this article, conclusions as to the value of the civil jury system to the Australian community are made. In coming to these conclusions, the empirical results will be placed in the context of the historical and contemporary perspectives of the value and place of the civil jury system in Australia.

II HISTORICAL UNDERPINNINGS OF THE CIVIL JURY SYSTEM

For centuries the jury has provided a positive civic experience for citizens, and some attempts to reduce juror involvement in the legal system has been perceived as being unhealthy for our democratic community.¹² For example, the Victorian government attempted to remove the right to civil jury trial in 1993.¹³ However, the huge public outcry caused the government to shelve the proposal.¹⁴ The proposal to remove the right of Victorian citizens was perceived as an attack on the tradition of democracy, as 'trial by one's peers' represents the democratic ideals of our community.¹⁵

Those promoting the civil jury often claim that the democratic right to a trial by one's peers forms the basis for the jury system and dates back to the way in which property disputes were dealt with in the High Middle Ages. For example, it is recorded that around 1054, a dispute of land boundaries between two abbeys was determined by five elderly laymen of the area, two of whom were chosen by one abbey and three by the other. Their verdict specified the land boundary.¹⁶ By

¹¹ Victoria, Department of Justice, *Survey of Victorian Jurors Report* (October 1998) 62.

¹² Barker, above n 2.

¹³ Office of the Attorney-General, Victoria, 'Juries (Amendment) Bill' (Press Release, 24 August 1993).

¹⁴ Michael Magazanik, 'Plan to Scrap Civil Juries', *The Age* (Melbourne), 7 August 1993, 3; John Voyage, 'Good Folks who Keep the System True', *The Age* (Melbourne), 26 August 1993, 16; David Cotter, 'Head to Head: Should juries in civil cases be abolished?', *Herald Sun* (Melbourne), 11 August 1993, 12; Bernard Murphy, 'Head to Head: Should juries in civil cases be abolished?', *Herald Sun* (Melbourne), 11 August 1993, 12.

¹⁵ Magazanik, above n 14, 3.

virtue of the fact that these jurors were chosen by the litigants, they in effect acted as representatives of the parties to the dispute.

During the High Middle Ages, the hegemonic class placed pressure on the Crown to grant them juries of their ‘peers’. The nobility wanted their feudal peers of tenure and not the King’s courts to preside over their legal disputes. King Henry acceded to the request from the nobility in 1156 at the great Assize of Clarendon where, ‘for the first time since the heyday of Athens ... those seeking redress of their grievances could have their case settled not by the King, not by priest, not even by the King’s judge or the King’s commissioners, but by their own peers’.¹⁷

A century later, a similar catch phrase (‘trial by one’s peers’) is referred to in Chapter 29 of the Magna Carta; ‘No man shall be taken or imprisoned, or be disseised of his freehold or liberties or free customs, or be outlawed or exiled or otherwise destroyed; nor will he pass upon him nor condemn him, but by lawful judgment of *his peers* ...’ (emphasis added). The Magna Carta is traditionally seen as the basis for the right to trial by jury in Common Law countries and has been seized upon, by staunch supporters of the jury system, as a foundation to promote their democratic notions. For example, in the eighteenth century, Blackstone interpreted the twelfth-century statement as follows: ‘The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter.’ Blackstone adds to his interpretation of the Magna Carta the right to trial by ‘the peers of every Englishman’ (emphasis added).

Some academics have rightly challenged this interpretation.¹⁹ The original reference in the Assize of Clarendon to ‘one’s peers’ is argued to refer to the elite of society, to the exclusion of the general community. Critics point out that ‘trial by one’s peers’ is most likely to have been introduced in order to assure that property disputes between noblemen were tried by one’s feudal peers and not by the King’s courts; in effect, it is merely a provision to protect the powerful feudal lords (who were parties to civil disputes) against the encroachments of the King at a time when the judges were the King’s servants.²⁰ There is no necessary link between the institution of the civil jury and democratic culture since, historically, the civil jury comprised of one’s peers was formed as a defence of feudal social structures.

Up until the sixteenth century, jurors were chosen by the parties for their prior knowledge of the dispute, and were duly examined as witnesses as part of the legal process.²¹ Even though a prerequisite for jury service was land ownership,

¹⁶ Raoul Charles van Caenegem, *The Birth of the English Common Law* (1973) 77.

¹⁷ John Guinther, *The Jury in America and the Civil Juror; A Research Project Sponsored by the Roscoe Pound Foundation* (1998) 11-2.

¹⁸ William Blackstone, *Commentaries on the Laws of England*, Book IV (15th ed, 1809) 349.

¹⁹ Anthony Dickey, ‘The Jury and Trial by One’s Peers’ 11 *University of Western Australia Law Review* (1973-4) 205, 207; Lewis Mayers, *The American Legal System* (1955) 167.

²⁰ Justice William Windeyer, *Lectures On Legal History* (2nd ed, 1949) 81.

the rich landowners began to avoid jury service during the seventeenth century by placing others on the panel in their place.²² Stephen Landsman believes that the avoidance of jury service by rich landowners meant that men of more modest means who served in their place were introduced to the power of legal decision-making and began to appreciate the virtues of self-government.²³ The jury was the most representative institution available to the English people in the seventeenth century,²⁴ and significantly contributed to the establishment of the 'fundamental principles of democratic governance.'²⁵

During the seventeenth century, the role of the jury in the English legal system altered as other governmental representative institutions were introduced. Clarke notes that the application of the representative principle through the jury would have been impossible without it occurring within the framework of the concurrent formulation of political representative institutions.²⁶ British Parliament was labelled by commentators of the seventeenth century the 'Grand Inquest of the Nation'.²⁷ In turn, the British Parliament, in formulating the Bill of Rights in 1689, defined the jury as one of the 'ancient liberties', a precondition to a constitutional monarchy.²⁸ The historian John Beattie declared that '[t]he late seventeenth century was the heroic age of the English jury, for in the political and constitutional struggles of the reigns of Charles II and James II, trial by jury emerged as the principal defense of English liberties.'²⁹ The jury had now taken on a democratic character.

The emergence of the jury as a protector of democratic freedoms was propelled further in the eighteenth century by industrialisation. This brought with it the invention of the printing press, which in turn necessitated the dominance of a universal language. In 1731, English was declared to be the official language of the law of England.³⁰ The dominance of the English language and the demise of dialects brought about a distinct shift in the rationale for the role of juries, from representing the individual communities of the parties to representing the broader English community.

Jurors prior to the end of the sixteenth century were locals who spoke the same

²¹ Ibid 62. In 1468, the jury process was described by Fortescue. An extract from Fortescue's *De Laudibus Legum Angliae* can be found in Julius Stone and William Wells, *Evidence: Its History and Policies* (1991) 20-1.

²² Stephen Landsman, 'The History and Objectives of the Civil Jury System' in Robert Litan (ed) *Verdict Assessing the Civil Jury System* (1993) 3, 30.

²³ Ibid 68.

²⁴ Stephen Roberts, 'Juries and the Middling Sort: Recruitment and Performance at Devon Quarter Sessions, 1649-70' in James Cockburn and Thomas Green (eds), *Twelve Good Men and True* (1988) 182.

²⁵ Landsman, above n 22.

²⁶ Maude Clarke, *Medieval Representation and Consent* (1964) 285. See also Theodore Plucknett, *A Concise History of the Common Law* (5th ed, 1956) 137.

²⁷ Plucknett, above n 26, 137.

²⁸ Mark Findlay and Peter Duff (eds), *The Jury Under Attack* (1988) 140.

²⁹ John Beattie, 'London Juries in the 1690s' in Cockburn and Green, above n 24, 214.

³⁰ Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (1994) 133.

dialect as the parties to the dispute, and were most likely neighbours of the litigants. They were knowledgeable as to the subject matter of the dispute. Foreign litigants had the right to a jury consisting of half of their own community.³¹ Following the adoption of English as the dominant language of England, juror requirements were changed. A foreign litigant could no longer insist that the jury include men from his own community.³² Dispute resolution by jurors who were well versed in the subject matter and knew the parties in dispute, yielded to the attainment of the proper 'perception' of justice; a justice free from the bias that emanates from holding pre-conceived ideas about the issues in dispute. The juror was now required to be an impartial trier of fact. Herein lies the origin of the contemporary jury.

In summary, the present form of the civil jury bears little resemblance to earlier manifestations. Since the twelfth century, the juror has undergone a metamorphosis from representative of the feudal lords, to local community representative, to impartial trier of fact and representative of the general community. Intimacy has been replaced by objectivity. Whilst the image of the jury for contemporary Australians is an image of an institution that has always been there to protect all citizens, the history of the institution shows otherwise. Whilst the phrase 'trial by one's peers' can be traced back to the twelfth century, the terminology as used in the twelfth century referred to a system where the jury was initially used by the wealthy to enhance their positions of commercial power in the community. This is at odds with the democratic ideals represented by the jury today.

The democratic ideals that the civil jury is perceived to have promoted over the last two centuries are well described by the nineteenth century philosopher/politician, Alexis De Tocqueville:

I am so entirely convinced that the jury is pre-eminently a political institution that I still consider it in this light when it is applied in civil causes ... (When) the jury acts also on civil causes, its application is constantly visible; it affects all the interests of the community; everyone co-operates in its work: it thus penetrates into all the usages of life ... The institution of the jury, if confined to criminal causes, is always in danger; but when once it is introduced into civil proceedings, it defies the aggressions of time and man ... In whatever manner the jury be applied, it cannot fail to exercise a powerful influence upon the national character; but this influence is prodigiously increased when it is introduced into civil causes. The jury, and more especially the civil jury, serves to communicate this spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions.³³

De Tocqueville believed that the civil jury system was as direct a consequence of

³¹ Ibid 112-3.

³² Ibid 122.

³³ Alexis de Tocqueville, *Democracy in America* (1st ed, 1946) 284.

the sovereignty of the people as universal suffrage. He believed that you could not have a democracy unless such community-inclusive institutions existed. The value of the civil jury is that it communicates the legal ethos of the community's representative decision-makers to the community. Some commentators refer to this element of a democracy as 'collective wisdom'.³⁴ Aristotle described the prime virtue of democracy as bringing together ordinary people from different backgrounds to achieve a 'collective wisdom' that none could achieve alone.³⁵ David Millon also believes that 'democracy is premised on faith in the ability of mass political processes to generate a kind of collective wisdom and the epistemological accessibility of the law as a condition of this faith'.³⁶ An ideal way to create a vehicle for 'collective wisdom' is the jury. The jury therefore contributes to creating a culture of democracy. Along with the criminal jury system, the institution of the civil jury is a powerful symbol of our democratic tradition. In this way the traditions associated with the civil jury system serve to promote the legitimacy of the contemporary legal system.

III THE VALUE OF THE CIVIL JURY SYSTEM TO THE CONTEMPORARY AUSTRALIAN COMMUNITY

Even if it is historically inaccurate to claim that the democratic right to a trial by one's peers forms the basis for the jury system, the inclusion of lay peers in our legal system may still be argued to be a worthwhile component of a liberal democracy. One way in which the civil jury is argued to be of value to a liberal democracy is that it breeds legitimacy of the legal system and consequently compliance with community laws. Legitimacy, the belief that one ought to obey the law, forms a basis for the effective functioning of legal authorities. Some social scientists assert that legitimacy is crucial if the authorities are to have the discretionary power they need to fulfil their roles. Whilst there is no evidence to directly support the assertion that civil juries breed legitimacy of the legal system,³⁸ it is arguable that layperson involvement promotes the perception that the civil laws are made 'by the people, for the people'.

A study conducted by Tom Tyler in the late 1980s lends some support for this assertion. Over 600 interviews were conducted with citizens of Chicago who had had recent experience with police officers or court officials (jury duty was not defined as recent experience for the purposes of this study). Tyler concluded that

³⁴ Larry Alexander, Frederick Shauer and Robert P George, 'Developments in the Law: The Civil Jury' (May 1997) 110 *Harvard Law Review* 1408, 1439. See also David Millon, 'Objectivity and Democracy' (1992) 67 *New York University Law Review* 51, 53. Millon does not use the term 'collective wisdom' specifically, but discusses a general concept that basically means the same thing.

³⁵ Jeffrey Abramson, *We, the Jury: the Jury System and the Ideal of Democracy* (1994) 11.

³⁶ Millon, above n 34, 53.

³⁷ Tom R Tyler, *Why People Obey the Law* (1990) 161.

³⁸ Tyler observes that: 'Although the assumption that legitimacy enhances compliance has traditionally been accepted by lawyers and social scientists, it has been pointed out that the assumption is not supported by convincing data': *ibid* 27

first-hand experience with police or the courts affects general views about the legitimacy of these authorities and subsequent compliance with the law.³⁹ Judgements about the fairness of the procedures used in the courtroom during the respondents' personal experiences influenced views about the legitimacy of the court system.

The Tyler study confirms that legitimacy plays a role in promoting compliance. It is reasonable to extend this finding to other first-hand court experiences, such as jury duty. Experience with the courts that allows observations of the fairness of courtroom procedures are likely to influence assessments of the legitimacy of the legal system.

The contemporary interaction that takes place between citizens acting as jurors and the civil legal system are likely to influence assessments of the legitimacy of the legal system. This interaction operates on three levels. First, layperson participation in the civil legal system moulds civil legal decision-making. Secondly, the perception that civil laws are made with some form of community consultation promotes legitimacy of the civil legal system. Thirdly, as Tyler's study suggests, juror experience with the courts is a way in which community members are able to observe the legal system which will in turn influence assessments of the legitimacy of the legal system. Layperson participation in the legal system influences both community *perceptions* of the legal system (factors two and three) and the actual results, the *reality* of the legal system (factor one). These three influences will now be explained.

A Layperson Participation in the Civil Legal System Moulds Civil Legal Decision-Making

Civil jury decisions serve to decide cases between individual litigants. In this way, community attitudes are directly expressed in each verdict delivered. Although civil jury trials make up a relatively small number of trials today,⁴⁰ the impact of the jury in the torts system is greater than the sum of cases tried. Jury verdicts indirectly mould civil legal decision-making by influencing the decisions of other participants in the legal system such as the judiciary, litigants and their lawyers.

Judges can learn from jury verdicts as they serve to indicate community values. As Justice McHugh reflected on his experience with jury verdicts in a recent High Court case: 'I realised I was out of touch; that I had a set of values that just were out of touch [with that of the ordinary person]'.⁴¹ The laws should reflect the community and be responsive to the community's needs. Judges, the majority of whom are male, middle-class and from Anglo-Saxon backgrounds, are at a

³⁹ Ibid 94, 108.

⁴⁰ There is a dearth of data in relation to the use of civil juries. The author estimates that civil jury verdicts are likely to make up less than one quarter of all recent civil determinations in the Supreme and County Courts of Victoria. Writs for trial by jury represented 7 per cent of all writs filed in Victorian Supreme Court Registries in 1998. Of the cases listed for trial in the County Court, about one quarter are jury trials: Stephen Colbran et al, *Civil Procedure: Commentaries and Materials* (2nd ed, 2002) 806.

disadvantage in being able to ensure that their decisions incorporate contemporary community values. No matter how intellectually brilliant the judges may be, the very fact that they share the same privileged background means that they cannot have an in depth understanding of the moral values of the majority of the general community. Citizen participation injects community values into our legal system by the influence that civil jury verdicts have over the judiciary. In this way, civil juries act as an educator of the judiciary.

Civil jury verdicts not only influence the judges, but also serve to influence the litigants and their lawyers. The perceptions of the jury of parties to civil disputes affects how they behave within the system. Plaintiffs take into account how they think a jury will react to their case when deciding whether to bring a claim or settle a current claim. Lawyers model advice to their client about the progress of their legal dispute according to their opinion of the civil jury system.

The influence of jurors over civil legal decision-making has become more pronounced as multi-national corporations dominate our economy.⁴² Traditionally, torts cases heard by a jury involved isolated disputes between private parties in which the role of the jury was to ensure that wrongdoers compensated the victim sufficiently. The amount of compensation should ensure that the plaintiff is put back to the position in which they would have been if the wrongdoing had never occurred. Jury torts trials of today no longer focus solely on individual justice based on past events.

Test cases and group proceedings, particularly in the product liability area, are becoming more common in Australian Courts. Such cases commonly present new factual scenarios where many individuals have suffered similar tragic personal injuries and often involve breaking new legal ground. A jury is commonly sought by one of the parties to such socially important cases. A current test case being played out in the Victorian courts is the claim by cigarette smoker Rolah McCabe against British American Tobacco.⁴³ The jury in this personal injuries case has yet to be set down for trial, however, the interlocutory steps have already received worldwide attention due to the potential economic impact. The results of such test cases can impact upon whether other smokers who have contracted lung cancer bring claims, or whether big businesses accept and rely on the court's decision in their approach to settling other similar claims that may be pending. The results of such test cases have the potential to jeopardise the survival of major corporations, and consequent market shake-up would occur.⁴⁴ The ripples made from one jury decision can be felt throughout the economy and can carry profound social and political implications. In this way, layperson participation in the civil legal system has the potential to make a

⁴¹ *Gerlach v Clifton Bricks Pty Ltd* (2002) 188 ALR 353.

⁴² See generally Peter Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (1987) and Valerie Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* (2000).

⁴³ *British American Tobacco Australia Services Ltd v Cowell* (2003) 8 VR 571. The High Court of Australia refused leave to appeal in this case in October 2003. However, it is still open to the McCabe family to bring the trial in the Supreme Court of Victoria trial division before a jury if they wish.

huge social impact on the community. Another example of a torts case with enormous social impact were claims brought by thousands of Vietnam war veterans against the US government and several large corporations in relation to the use of the dangerous herbicide known as Agent Orange. Such test cases

concern the public control of large-scale activities and the distribution of social power and social values for the future. The court and jury in these cases do not simply prescribe and apply familiar norms to discrete actions; they function as policy-oriented risk regulators, as self-conscious allocators of hard-to-measure benefits and risks, and as social problem solvers.⁴⁵

The influence of civil jury verdicts, albeit infrequently made, serve to mould civil legal decision-making in two ways. First, such verdicts can act as a guide to judges, litigants and their lawyers. Secondly, when cases with huge social impact come before the courts, the jury is sometimes asked to act as the social problem solver. In its role as a corporate regulator, the civil jury can influence community behaviour in ways that the criminal jury cannot. These influences serve to promote the legitimacy of the legal system as the jury acts as a mediator between the law and the people.⁴⁶

Also of concern to some commentators is the alternative to the civil jury system. It is argued that if the jury was removed and lawyers (judges and counsel) were entirely responsible for the conduct of trials, a small elite class in our community would be solely responsible for moulding civil legal decision-making. The lawyers would hold too much power over the remainder of the community. Professor Millon considers the impact that such a lawyer-dominated legal system has upon our identity as a democracy in his journal article 'Objectivity and Democracy'.⁴⁷ Millon argues that the legal profession (judges and counsel) in effect determines the law's meaning through collective interpretive practice. He goes on to say that because the legal profession is not accountable to the public, its interpretive powers appear to offend basic democratic principles. Millon identifies the jury as a good means by which to break the legal profession's monopoly over interpretive lawmaking power.

Millon argues that the legal profession's monopoly over the civil legal system gives lawyers too much power. Furthermore, it can be argued that removing all lay participation with the civil legal system damages the perception that civil laws are not imposed on the community but are made 'by the people and for the people.' This argument is explained in the next section.

B The Perception of Citizen Participation in the Legal System Promotes Legitimacy of the Civil Legal System

⁴⁴ See, eg, William Birnbauer, 'How Big Tobacco was Forced to Cough Up' *The Age* (Melbourne), 3 July 2005.

⁴⁵ Schuck, above n 42, 4.

⁴⁶ Michael Freeman, 'The Jury on Trial' (1981) 34 *Current Legal Problems* 65, 89-90.

⁴⁷ Millon, above n 34.

If the contemporary community perceives that there is value in the civil jury system then that confidence in the jury system serves our community well. As one commentator explains: '[t]he issue of community confidence is extremely important. So much so that people's perception of whether justice has been served can influence their regard for the institution, their feelings of pride in their citizenship, and even their willingness to obey the laws'.⁴⁸ Respect for the law is fundamental to the proper functioning of a democratic society.

The importance of jury involvement in interpretive lawmaking today is emphasised by a current perception held by some members of the Australian community that the judiciary, who are supposed to act as community representatives in the legal system, do not generally share life experiences that reflect those of the community. More specifically, the judiciary is under attack for lacking any balance in gender, cultural and class backgrounds.⁴⁹

The composition of the High Court of Australia serves to highlight how unrepresentative the judiciary in Australia remains. In 100 years of appointments to the High Court, only one Justice has been a woman, despite the fact that for decades just as many women have graduated from Australian law schools as men. The judiciary fails to represent even this most basic demographic characteristic of gender. Men of middle- to upper-class and of Anglo-Saxon heritage dominate the High Court, just as politically conservative males dominate the cabinet that elects the judiciary. In an era when distrust of the Australian judiciary is evident,⁵⁰ the inclusion of jurors in the legal system works towards insulating the judges from the criticism that the community's legal decision-makers fail to adequately represent the community.⁵¹

Whilst evidence is lacking on this subject, it is arguable that layperson involvement promotes the perception that the civil laws are not imposed on the

⁴⁸ Charlan Nemeth, 'Jury trials: Psychology and the law' in Leonard Berkowitz (ed), *Advances In Experimental Social Psychology* (1981) vol 14, 309, 359, quoted in Ivan Vodanovich, 'Criminal Jury Trial in Western Australia' (PhD thesis, University of Western Australia, 1989) 196.

⁴⁹ Ibid 54-5. See also Rickard Ackland, 'Same gender, same city, same university, same club ... now the same court', *Sydney Morning Herald* (Sydney), December 20 2002; Kim Rubenstein, 'In High Court selection, like promotes like', *The Age* (Melbourne), 20 December 2002; 'Changing of the Guard at the High Court' (adapted from Radio National's *The Law Report*) 4 February 2003; Peta Donald, 'No gender considerations in High Court appointment' PM (ABC) 18 December 2002; Rachel Davis and George Williams, 'A Century of Appointments But Only One Woman' (2003) 28(2) *Alternative Law Journal* 54.

⁵⁰ In 1993, when the Victorian government proposed the further reduction of the civil jury, Voyage argued that 'at a time when judges and lawyers are being criticised for being out of touch with the day-to-day lives of ordinary people' it would be wrong to curtail the civil jury as it would result in the 'judges being even further removed from community standards': John Voyage, 'Good Folks who Keep the System True', *The Age* (Melbourne), 26 August 1993, 16.

⁵¹ There are some that argue that juries fail to adequately represent the community. See, eg, Howard Nathan, 'Head to Head: Does the jury system need a radical overhaul', *Herald Sun* (Melbourne), 20 August 1997, 18; Howard Nathan, 'The Civil Jury System: An Appropriate Method of Trial' (Speech delivered at the General Meeting of the Medico Legal Society of Victoria at the Victoria Club, Melbourne, 16 November 2002). However, unlike the selection of the judiciary, the current jury selection processes attempt to ensure that the jury represents a fair cross-section of our community. In order for jury decisions to represent the community's values and attitudes, the mix of backgrounds of the jury need not mirror but must adequately represent the mix of backgrounds in the community. 'Representation' in the jury selection context means an adequate reflection of

community by the legal profession but are made by the community. Perceptions of justice being done are just as important to a democratic community as justice being done. In this way, it is argued that the presence of laypeople in the civil jury system works towards ensuring that the legitimacy of our legal system is maintained.

C Citizens Gain a Positive Perception of the Legal System Through their Direct Exposure to the Workings of the Civil Legal System

Another important way in which positive community perceptions of the legal system are nurtured is through the community's first-hand experiences of the legal system. Civil jurors take their experience of jury duty back into the community when they discuss their perceptions of their experience of the civil legal system with their friends, colleagues and family. The sharing of their experience contributes to their friends', colleagues' and family's perception of the civil jury system.

Civil jury duty gives ordinary citizens a view into their legal system thereby serving a community educative function. Jury service allows citizens to see how their courts, their judges and the lawyers operate. Assuming that jurors are impressed with what they see, this exposure to the workings of our legal system is thought to engender greater trust in our laws. This assumption is explored in the next section, where the perceptions of the civil jury system held by the juror respondents to the author's survey are analysed. The civil jurors who responded to the survey were asked about their views of the civil jury system and whether the experience of jury duty was worthwhile. The following exploration of jurors' perceptions of the civil jury system will enhance the ongoing debate as to the value of the civil jury system as these perceptions are empirically based.

IV THE EMPIRICAL RESULTS

Anecdotal evidence surrounding the jury system has dominated the debate as to the value of the civil jury system to contemporary Australia. The aim of the author's empirical study was to address the gap of valid empirical research into the civil jury system in Australia by questioning three of the main protagonists in the civil jury system about their perceptions of the system. The empirical study particularly focuses on the views of the civil jurors. Jurors are the group in the

(cont'd) the composition of society in terms of factors including gender, age, cultural background and socio-economic status. The random selection process should provide 'a sample of the larger population' in order to ensure that the base characteristics of civil jurors adequately represent the composition of the population: see Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria, Final Report* (1996) vol 1, 19. The notion that the jury is a sample of the larger population allows the jury, symbolically, to represent the entire community. The demographic profile of the civil jury in the author's survey confirms that the civil jury in 2001 was adequately representative of the Victorian community in terms of gender, age, cultural background, educational and employment status: Horan above n 3, ch 7.

community most intimate with the inner-workings of the civil jury system. They are the only ones privy to jury deliberations. Furthermore, civil jurors play a role in influencing the general view of the community on the value of the civil jury system. Following jury duty the jurors return to the community, and are likely to share their experiences of the civil jury system with their family and friends. The impressions that the jurors hold will therefore contribute to the community's perceptions of the civil jury system. In this way, the civil jury is argued to promote community legitimacy of the legal system and consequently compliance with community laws.

Sixty-nine civil jury trials were conducted in Melbourne during the 12-month survey period (2001). Four hundred and fourteen citizens served on civil juries, 411 of them chose to participate in the survey. The jurors were keen to share their perceptions of the civil jury system.⁵²

The jurors' general views of the jury system are canvassed in the first part of this section.⁵³ Their views as to whether jury duty was a worthwhile experience are then explored in Part B. The strength of their responses to the jury experience is tested in Part C, where the jurors' willingness to serve again in due course is discussed. The jurors were also asked to choose their preferred decision-maker in a series of hypothetical civil cases. Their responses to these hypothetical questions are analysed in Part D and compared with the responses of the court staff and civil jury trial judges to the same set of hypothetical questions in Parts E and F.

A The Jurors' General View of the Jury System

The questionnaire directly asks the respondent jurors for their general view of the jury system and whether this opinion has altered since performing jury duty. The respondent jurors were given the choice of five responses to the following question:

Having now served on a jury, what is your general view of the jury system?

- 1 same as before, favourable
- 2 more favourable than before
- 3 less favourable than before
- 4 same as before, unfavourable
- 5 other.

⁵² The research methodology of the empirical study conducted, including how the survey questions were formulated, has been detailed in Horan, above n 3, ch 2.

⁵³ There are limitations in interpreting the data. For example the legitimacy argument is difficult to test empirically as it involves evaluating individual values. There are no set criteria used to measure the performance of the civil legal system. By having to use a multiple choice paper based survey, the results were necessarily influenced by the language used in questionnaire. Furthermore, there were limitations placed on the researcher in obtaining the data. Limitations in obtaining the data and interpreting the data are detailed in chapter 2 of the author's PhD thesis: Horan, above n 3.

The respondent jurors' perceptions of the jury system provide an indicator of whether the Victorian community has confidence in this system. A positive response to this question will indicate that the civil jurors have a positive attitude towards the jury system. This reflects well on the legal system, as the jury system is an integral part of the broader legal system. Conversely, a negative response to this question will reflect badly on the jury system. If jury service leads to citizens forming a less favourable view of the jury system, then the confidence that the community needs to have in their legal system is being damaged.

The responses of the jurors strongly indicate that they think favourably of the jury system (Table 1). Two hundred and thirty-nine respondent jurors (58%) said that they viewed the jury system favourably. They held this opinion prior to their jury duty in 2001. A further 121 respondent jurors (29%) believed that they viewed the jury system more favourably following their jury duty. Almost a third of civil jurors for 2001 have gained confidence in the jury system as a direct result of experiencing jury duty. Overall, an overwhelming 87 per cent of jurors held a favourable opinion of the jury system.

Table 1
Having now served on a jury, what is your general view of the jury system?

	Respondents ¹	Percent ²	Valid Percent ³
Valid ⁴			
same as before, favourable	239	57.7	59.9
same as before, unfavourable	7	1.7	1.8
more favourable than before	121	29.2	30.3
less favourable than before	25	6.0	6.3
other	7	1.7	1.8
Total	399	96.4	100.0
Missing ⁵	15	3.6	
Total	414	100.0	

¹ 'Respondents' refers to the 414 jurors that were asked to answer the survey

² 'Percent' refers to the percentage of responses, including those that failed to answer the question

³ 'Valid Percent' refers to the percentage of responses excluding those that failed to answer the question

⁴ 'Valid' refers to those respondent jurors who answered this question

⁵ 'Missing' refers to those respondent jurors who did not answer this question

Only seven respondent jurors (2%) maintained an unfavourable view of the jury system. This unfavourable opinion was formed prior to their jury experience and remained unchanged following their jury duty. Twenty-five respondent jurors (6%) viewed the jury system less favourably following their jury duty.

Those with less favourable or unfavourable views of the jury system did not

necessarily serve on the same jury trials. A bad experience in one jury trial was not to blame for the jurors' dissatisfaction. There was also no link between these negative opinions and jurors who sat on trials that were longer than the average trial, trials where the jury was dismissed before a verdict was made, or trials where there was disagreement in the deliberation process.⁵⁴ Prima facie, the results to this question show that civil jury service is not a negative experience for citizens.

It is worthwhile knowing the basis for the respondent jurors' positive perceptions of the jury system. Did their 'one off' experience of jury duty create their favourable opinions of the jury system or were their opinions held before this most recent experience? The respondent jurors' opinions may have been influenced by several factors. A citizen may learn about the jury system through the education system, from the media, by word-of-mouth or from first-hand experience of sitting as a juror. The basis for the respondent jurors' opinions was explored in the survey.

Two hundred and forty six respondent jurors believed that their views of the jury system were unchanged following their experience of jury duty (Table 1). The majority of respondent jurors' views (58%) were already positive before jury duty in 2001. Personal participation as a juror may not be necessary to promote a positive attitude and consequent confidence in the jury system. The positive opinions of the jury system may have been obtained from the media or from learning about the jury system at school. If personal participation does not positively influence community opinion of the jury system, then the portrayal of jury service being an important civic experience for members of our community could be challenged. However, this depends upon how the respondent jurors came to formulate their previous opinions. It is necessary therefore to explore the basis for the respondent jurors previous opinions. Two of the questions in the questionnaire were designed to explore this further.

The respondent jurors were asked whether they had ever served on a jury before. Prior service could have been on a criminal or civil jury. If a juror had served on a jury before and said in response to the survey that their view of the jury system was the *same as before, favourable*, then it is likely that the prior jury service contributed to the juror's favourable view of the jury system. The contention that jury duty is a positive tool with which to educate the community, and therefore an important civic experience, gains support.

Table 2
Have you ever sat on a jury before?

		Respondents	Percent	Valid Percent
Valid	no	348	84.1	85.5
	yes	59	14.3	14.5
	Total	407	98.3	100.0
Missing		7	1.7	
Total		414	100.0	

⁵⁴ For a complete analysis of these issues see Horan, above n 3, ch 3.

Fifty-nine respondent jurors (14%) said that this was at least their second time of serving as a juror where 84% of the jurors were first-time jurors (Table 2). The high level of first-time jurors shows that the onus of jury service is spread across the community and is not borne by a small group of repeat jurors.

A secondary indicator of the respondent jurors' exposure to the jury system prior to jury service is to ask if any of their friends, family or acquaintances have ever sat on a jury. Two hundred and fifty four respondent jurors (61%) said that they had encountered some form of general exposure to the jury system prior to jury duty (table 3). One hundred and fifty-seven jurors (38%) did not know people who had served on a jury.

Table 3
To your knowledge, have any of your friends, family or other people that you know served on a jury?

		Respondents	Percent	Valid Percent
Valid	yes	254	61.4	61.8
	no	157	37.9	38.2
	Total	411	99.3	100.0
Missing		3	7	
Total		414	100.0	

These results provide a basic indicator of the level of indirect exposure to the jury system held by respondent jurors prior to their jury duty in 2001. The author is mindful that the results to this question only serve as a basic indicator of exposure to the jury system. Prior exposure may be as insignificant as knowing that a work colleague had taken time off work to perform jury service, without ever discussing their experience of jury service with the work colleague. It cannot be assumed that just because you know someone who has served as a juror that you have discussed their experience with them, although this is one likely implication. On the other hand, it is likely that family members do return home and discuss their experience of being a juror and their opinion of the jury system with the people they live with. Given that 99.5 per cent of civil jurors during the survey period volunteered to share their experiences of jury service by participating in the survey, it is a good indication that the jurors would go back to their community and share the same positive experiences that they shared with the author with their family and friends.

Almost two thirds of the 348 respondents who were first-time jurors (84%) knew someone that had served on a jury (60%). A third of the first-time jurors had no such exposure to the jury system via friends, family or other people that had served on a jury. Overall, two thirds of respondent jurors stated that they had some form of exposure to the jury system prior to being called for jury duty in 2001.

In conclusion, the responses to the second and third question addressed in this

article show that jury duty does touch, directly or indirectly, a considerable proportion of our community. In Victoria, almost two thirds of all the respondent jurors had had some form of prior exposure to the jury system before their 2001 jury duty experience. A large proportion of the adult population in Victoria has been exposed to the jury system in some way.

B Was the Experience of Being a Jury Member Worthwhile?

As noted in Part III(C) above, the community educative aspect of the experience of jury duty is of prime value and is a justification for the civil jury system. However, this conclusion is contingent upon the education being perceived as being of benefit to the recipients. If jurors perceive jury service as an inconvenience and nothing more, then the educative value of jury service is not so compelling. The community could be educated about the legal system by more cost-effective means. Conversely, if the civil jurors perceive that jury service is worthwhile, then there is value for the contemporary community in maintaining the civil jury system. In Dr Evatt's opinion

the objection of inconvenience to jurors or expense to the State sinks into comparative insignificance if it is established that a considerable section of the people is of opinion that the administration of justice requires a greater infusion of the popular element.⁵⁵

The next two questions of the juror survey that are addressed in this article tested whether the jurors perceived that their experience of jury duty was worthwhile to them. The respondent jurors were asked if they thought their experience of being a jury member had been worthwhile. Three hundred and ninety seven respondent jurors (96%) responded positively to this question (Table 4).

Table 4

Do you think that your experience of being a jury member has been worthwhile to you?

		Respondents	Percent	Valid Percent
Valid	yes	397	95.9	96.6
	no	13	3.1	3.2
	yes and no	1	.2	.2
	Total	411	99.3	100.0
Missing		3	.7	
Total		414	100.0	

Agreeing that their experience of jury duty was worthwhile implies that the jurors believed either they learned something from their experience, or that the experience simply made them happier people. Although it is not clear precisely what the jurors learnt or felt that led them to believe that jury service was a

⁵⁵ Herbert Evatt, 'The Jury System in Australia' (1936) 10 *Australian Law Journal* 49, 73.

positive experience, there is no doubt that many respondent jurors would take back to the community the perception that serving as a juror is worthwhile.

Of the 13 respondent jurors who said that the experience of jury service had not been worthwhile (Table 4), seven still held a favourable view of the jury system, a view that they had formulated prior to jury duty in 2001 (part of Table 1). A further three juror respondents said that although the experience of being a jury member had not been worthwhile, their view of the jury system was more favourable than before. Those three respondent jurors presumably believe that gaining a more favourable view of the jury system was not personally worthwhile for them. Only three juror respondents shared both an unfavourable or less favourable view of the jury system and a belief that the experience of jury service had not been worthwhile. This equates to less than one per cent of all responses.

Jury studies from other Australian and overseas jurisdictions confirm that jurors believe that jury service is a rewarding experience.⁵⁶ Most recently, in a survey of criminal jurors in New Zealand, the respondents were asked how they felt about their experience as a juror. Positive comments were made by 82 per cent of jurors, 38 per cent of whom felt that their experience had been worthwhile. The respondent jurors acknowledged both positive personal gains and a belief that they had fulfilled an important civic duty.

Overall, the fact that the vast majority of civil jurors perceive their jury experience to be worthwhile supports the claim that the educative quality of the experience of jury duty is valuable to a democratic society. Most jurors on returning to the community would describe their jury experience to others as worthwhile.

C *Would the Civil Jurors be Willing to do Jury Service Again?*

A further endorsement of the civil jury system by the civil jurors is illustrated by the fact that three quarters of all civil jurors who served in 2001 were also willing to sit on a jury again if asked to do so in three years time.⁵⁷

⁵⁶ See Mark Findlay, Peter Duff and The Australian Institute of Judicial Administration Incorporated, *Jury Management in New South Wales* (1994) 97. See also Vodanovich, above n 48, 187 (in his survey of WA criminal jurors in 1982-3). In one US survey, results showed that 68% of respondents felt that they learned something positive or factual while on jury duty: Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria*, Final Report vol 1 (1996) 19.

⁵⁷ *Juries Act 2000* (Vic) s 13(1) provides that the Juries Commissioner can grant an exemption from jury service for up to three years to a person who has served on a jury. The respondent jurors were unlikely to know this or assume this when responding to this question. Consequently, a three year time period was specified so that jurors were not responding to the thought of having to undertake jury duty again immediately or in the near future.

Table 5

If you were called to sit on a jury in three years time, how willing would you be to do so?

		Respondents	Percent	Valid Percent
Valid	willing	208	50.2	50.9
	very willing	107	25.8	26.2
	not very willing	66	15.9	16.1
	unwilling	28	6.8	6.8
	Total	409	98.8	100.0
Missing		5	1.2	
Total		414	100.0	

Juries do not receive significant financial incentive to encourage them to repeat jury service. Jury fees are nominal. Despite the investment of time that jury duty necessitates, the respondent jurors found their experience enriching in a non-financial form. Only 94 respondent jurors (23%) expressed their reluctance in serving again by stating that they were either not very willing or unwilling to serve again if asked to do so in three years time.

The loss of income that a self-employed person is likely to suffer when they attend for jury service suggests that self-employed jurors might be reluctant to serve again. However, self-employed jurors were no less willing to serve again than the average juror (24%). Of all the basic demographic characteristics tested in this study,⁵⁸ age was the only factor that impacted upon the jurors' willingness to serve again. The younger the juror is the less willing they are to serve again. Twenty-nine per cent of jurors aged between 18-24 years of age were either not very willing or unwilling to serve again. To the other extreme, 19 per cent of jurors 65 years of age or older were either not very willing or unwilling to serve again in due course.

The willingness of the majority of jurors to serve again in due course re-enforces the overall finding that jury duty is a positive experience for the respondent jurors.

D The Civil Jurors' Preference of Decision-Maker

The positive views voiced by the respondent jurors to questions analysed above suggests that they are confident in the jury system and perceive the jury as a competent decision-maker. The implication that the jury is perceived as a competent decision-maker by respondent jurors was tested further by a series of hypothetical questions asking the respondent jurors to identify their preferred decision-maker.

Logically, it would follow that if the respondent jurors were truly impressed with the jury as a decision-maker, they would show a clear preference for having a jury

⁵⁸ The demographic profile of the author's survey asked for the respondent juror's gender, age, cultural background, employment status and level of educational attainment: Horan, above n 3, ch 7.

hear any legal dispute they may be involved in. Alternatively, the respondent jurors' positive opinions of their experiences of jury service may not translate into a deep conviction in the jury system as their preferred decision-maker. Jurors could find their experience of jury service gratifying but might never trust a group of lay people to determine any legal dispute that they might be involved in. Jury service may give jurors an appreciation of the difficulty of the task of legal decision-making. This could engender an awareness that the task requires the expertise of professional decision-makers such as judges.

The survey questions analysed tested the respondent jurors' perceptions of judge and jury decision-making.⁵⁹ The level of endorsement for the civil jury in hypothetical personal claims measures the depth of confidence that the respondent jurors hold in the jury system. If the respondent jurors are confident in the jury as a decision-maker, then the argument that jury involvement in the civil legal system is likely to strengthen community confidence in the legal system is supported. If the results show that the respondent jurors prefer to trust a judge with their own legal disputes, or if they do not show a preference for a jury, then it can be argued that the community may be best served by considering more cost-effective ways of educating the community about the legal system in order to win its confidence.

The respondent jurors were asked to select their preferences of decision-maker if they were involved hypothetically in civil litigation in three fact scenarios. These scenarios cover typical civil jury cases:

1. a personal injuries claim
 - a. received from an employee (personal injuries defendant)
 - b. against your employer (personal injuries claimant)
2. a medical negligence claim against your doctor (medical negligence claimant)
3. a defamation claim against a newspaper (defamation claimant).

The respondent jurors were asked to indicate their hypothetical preference of:

- a judge;
- a jury;
- no preference; or
- don't know.⁶⁰

⁵⁹ See Millon, above n 34, 51, 53.

⁶⁰ The last two options anticipate that some respondents may not have formulated a view on this issue or may not understand the question. In order to accurately gauge the strength of the respondent jurors' confidence in the jury system, it is important to identify those respondent jurors who did not care to consider the question or had not formulated a view on the issue. See generally Clyde H Coombs and Lolagene C Coombs, "'Don't Know': Item Ambiguity or Respondent Uncertainty' (1976) 40 *Public Interest Quarterly* 497; and Howard Schuman and Stanley Presser, 'Public Opinion and Public Ignorance: The Fine Line Between Attitudes and Non-Attitudes' (1980) 85 *American Journal of Sociology* 1214. It is noteworthy that few jurors gave the same response for all hypotheticals posed. The variation of responses to these questions is an indication that the questionnaires were filled in diligently and earnestly by the respondents. See generally Walter Blum and Harry Kalven Jr, 'The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Science' (1956) 24 *University of Chicago Law Review* 1, 7.

The respondent jurors were of the opinion that juries are more competent than judges as decision-makers for civil disputes. In their responses to the hypothetical questions, the jurors voiced a strong preference for a jury to hear their hypothetical civil cases. However, there were variations in the preferences according to each fact scenario.⁶¹

1 Personal injuries claims

The first question asked the respondent jurors their preference for a judge or a jury to hear their case if they were an employer being sued by an employee for a workplace injury. Sixty per cent (247) of respondent jurors preferred a jury to decide this case with 25 per cent (102) of responses preferring a judge and nine per cent (39) stating no preference between the two.

The second question asked the respondent jurors their preference of a judge or a jury to hear their case if they were an employee suing their employer over a work place injury. A jury was chosen by 73 per cent (300) of respondent jurors, with 14 per cent (58) preferring a judge and six per cent (26) expressing no preference between judge and jury.

Figure 1
If you employed a person who sued you because of a work place injury, who would you prefer to decide your case?

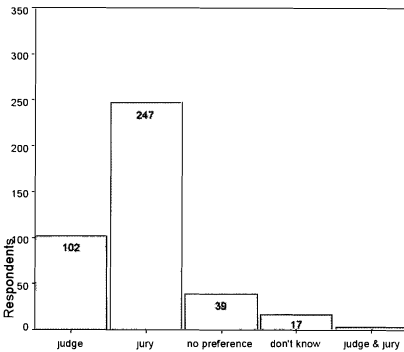
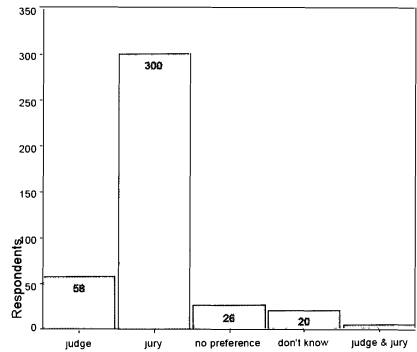


Figure 2
If you were to sue your employer because of a work place injury, who would you prefer to decide your case?



⁶¹ My analysis of four hypothetical questions has highlighted a variation of response according to the subject matter and parties to the dispute. Respondent jurors did not simply choose their preferred decision-maker and apply their preference to every scenario. This shows that the respondents do not vehemently support the jury and loathe the judge (or vice versa) as decision-makers. The four hypothetical questions asked the respondents to tick their preference from four options (a judge, a jury, no preference or no opinion) in relation to cases of differing subject-matter. It would be easy for a person who was not interested in giving thought to these questions to simply tick the same box for the nine questions. If a large proportion of responses showed such uniformity of response I would have to question the validity of the data. However, a small proportion of respondents to this series of similar questions opted to tick the same response for every question (less than 14%). Due to the high level of variation of response, I am confident that the data is reasonably reliable.

The first and second questions differ by asking the respondent jurors to consider their preferences according to whether they are the defendant/employer or the plaintiff/employee. The results show that the respondent jurors perceive there to be a notable difference between the way in which the two optional decision-makers treat the different parties to the dispute. When the respondent jurors were placed in the position of plaintiff rather than that of a defendant, the preference for a jury jumped 13 per cent and preference for a judge dropped 10.5 per cent.

The increase in preference for a jury in circumstances when asked to be a plaintiff almost mirrors the decrease in preference for a judge for the same question. The figures show that 53 more respondent jurors hypothetically favoured a jury trial over a bench trial as defendants. Forty-four more respondent jurors would prefer a judge when they were asked to be the employer than when they were asked to be an employee. Over 44 per cent of those who would prefer a judge to hear their case if they were an employer, would opt for a jury if they were the employee bringing the personal injuries case against the employer. The distinct change of preference shown by the respondent jurors is consistent with the perception that juries are pro-plaintiff and/or that judges are pro-defendant.

The respondent jurors may have concluded that the jury is likely to be composed of employees and people from poorer and less privileged backgrounds than a judge and, consequently, will be more sympathetic to the employee over the employer.⁶² The jurors may also react in favour of the plaintiff as a result of thinking that '[i]t could be me who had been injured at work'. The ability to relate closely to the plaintiff's predicament may result in the pro-plaintiff leaning.

The jurors who changed their preference to a jury for the 'employee' hypothetical may perceive that the plaintiff had some cause for bringing the action, encouraging them to assume that there must be some validity in the plaintiff's case.⁶³ This pro-plaintiff bias has not been specifically tested by empirical research.⁶⁴ One American study considered the matter as a side issue and concluded that to a minor extent jurors in civil trials jurors had a pre-trial 'leaning'. This leaning was usually pro-plaintiff and derived from the reasoning that the plaintiff must have had some cause for bringing the action.⁶⁵

Conversely, the differing levels of preference between the two decision-makers may be caused or contributed to by a perception that the judge holds pro-defendant leanings. The respondent jurors may perceive that the majority of

⁶² See generally Hans, above n 42, 138-214.

⁶³ The study was conducted by Pound and is referred to in Guinther, above n 17, 101.

⁶⁴ Ibid 93-4. Relatively few researchers have tackled the issue of jury bias. This is due to the issue being very subjective. You cannot achieve an accurate examination of the issue by asking the jurors whether or not they took into account their bias when making a decision. Given the limited access to jury trials that researchers encounter worldwide, questions surrounding the use of bias remains unanswered. Two large-scale mock jury trials have been conducted in the United States and neither noted significant jury bias. This could be attributed to the type of mock trial chosen or due to the artificial nature of a mock trial and the greater likelihood that mock jurors will be mindful of good behaviour.

⁶⁵ Ibid 101.

judges are male, have enjoyed a middle- or upper-class upbringing, and share a position of power akin to the power that employers have, and therefore would be more likely to sympathise with an employer. The possibility that one or both of the alternative civil decision-makers operate under a bias is further supported by the responses obtained to the third hypothetical question.

2 Medical negligence claim

The third question invited the respondent to place themselves in the position of a patient suing a doctor for medical negligence. Seventy-three per cent (302) of all respondents would opt for a jury if bringing a medical negligence claim with only 14 per cent (57) preferring a judge. The response to this fact scenario produced almost identical results to the first question (personal injuries claimant).

The similarity of response between the first personal injuries claimant question and the medical negligence plaintiff question suggests that a juror may perceive that a doctor shares a similarly powerful position in the community to that of an employer.⁶⁶ One possible explanation for the strong preference for a jury in a medical negligence claim is that doctors enjoy respect in our community. A patient would only dare challenge the competency of their doctor if there was some truth to the accusations made.

Another possible interpretation of the empirical findings is to apply the widespread Australian cultural prejudice against those in authority. This is commonly referred to as the 'tall poppy syndrome',⁶⁷ where the powerful in society (such as doctors and employers) are subject to heavy criticism and exacting standards. Community sympathies are with the 'Aussie battler' and not authority figures such as doctors and employers.

Another plausible explanation is that the respondent jurors perceive that doctors and judges share privileged backgrounds, and therefore a judge may be perceived to favour his influential counterparts by finding in favour of the doctor. A judge may sympathise with a doctor as a fellow professional and therefore may be reluctant to find another professional guilty of negligence.

3 Defamation claim

The final hypothetical question asked the respondent jurors to consider who they would prefer to decide their case if they brought a claim against a newspaper for defaming their good name. Sixty-three per cent of respondent jurors preferred a jury (261) with 21 per cent (88) preferring a judge. Once again, the respondents clearly showed a preference for a jury for this hypothetical scenario.

⁶⁶ Those who believe that the civil jury should not be retained argue that juries are overly sympathetic to individual plaintiffs suing 'deep pockets' like insurers and medical practitioners. See Stephen Daniels and Joanne Martin, *Civil Juries and the Politics of Reform* (1995) 43.

⁶⁷ In an internet survey conducted by the Australian National University in or about 1990, Australians were more likely to try to bring down 'tall poppies' than people of other industrialised democracies: Susan Mitchell, *Tall Poppies Too* (1991) vii. See generally Francis Smith, Samuel Goldberg and Anne Lane, *Culture and the 'Tall Poppy' in Australia* (1984) 3; and Gerald A Wilke, *Dictionary of Australian Colloquialisms* (1996) 299; and James Lambert (ed), *Macquarie Book of Slang* (2001) 238.

There are several factors that may explain the difference of preferences expressed by the respondent jurors in relation to bodily injury claims (personal injuries and medical negligence) and the honour-status injury claim (defamation). One possible explanation is that the respondent jurors thought judges are better decision-makers for defamation trials.

Another possible explanation for the shift in preference away from a jury for defamation claims could be the difference in social status of the hypothetical parties. The average Victorian would not perceive a newspaper publisher as belonging to the upper class. Whilst many newspapers in Victoria today are 'big business', they do occasionally challenge those in a position of authority. Newspapers are to some extent perceived by the community as 'champions of the underdog', a 'voice for the Aussie battler'.⁶⁸

Plaintiffs in a defamation claim are more likely to be perceived to be from the upper class. As the former politician Jim McClelland described, 'the law of defamation was the greatest single weapon of censorship in the armoury of the rich and powerful and corrupt'.⁶⁹ A layperson is more likely to perceive the plaintiff as rich and powerful, and coming from the same social class as judges, whereas newspaper publishers can be the judiciary's critics. This may have resulted in some respondent jurors perceiving that judges are less inclined to sympathise with the defendant newspaper.

Another common defendant in civil trials is the newspaper publisher in a defamation action. Unlike doctors and employers, newspaper publishers are unlikely to be perceived by laypeople as exerting the same direct power over them. It is logical that the community would not feel subservient to a newspaper publisher, but would perceive them as a source of information and empowerment.

The logic that there must be some validity in the plaintiff's case simply because the plaintiff has bothered to bring the claim to court could be a reason behind the pro-plaintiff leaning that the responses to the hypothetical questions highlight. However, the data shows that the respondent jurors' pro-plaintiff leaning was not as strong when the plaintiff was suing a newspaper for defamation as when they were making a personal injuries claim against their employer or a medical negligence claim against their doctor.

The subject matter of the hypothetical disputes may also have contributed to the altered levels of preference for a jury by the respondent jurors. Personal injury claims are all about compensating individuals for physical injury. The right to compensation for bodily injury is considered to be of greater importance in our community than the right to compensation for injury to one's reputation. In *Carson v John Fairfax & Sons*, a majority of the High Court bench held that the

⁶⁸ Although given the centralisation of media ownership in Australia over recent years, this perception is not likely to be so widely held.

⁶⁹ As cited in Brendan Edgeworth and Michael Newcity, 'Politicians, Defamation Law and the "Public Figure" Defence' (1992) 10 *Law in Context* 39.

scale of awards for non-economic loss in cases of serious personal injury must transcend injury to reputation.⁷⁰

Culturally, the Australian community regards vocal criticism of authority figures as acceptable behaviour. This is connected with the 'tall poppy' syndrome. If people put themselves in the social spotlight, then it is seen as socially acceptable to criticise their image or status. This cultural climate means that honour status injury claims are not considered to be as serious as bodily injury claims in the minds of the average Australian. This distinction is likely to have influenced the respondent jurors' opinions that a jury is more important in personal injuries proceedings than in defamation proceedings. It is unlikely that the respondent jurors would ever bring a defamation claim or know someone who has brought a defamation claim. The majority of defamation claims are made by relatively rich and powerful people; political, executive, judicial, business and professional members of the community use this claim.⁷¹ It is more likely that the respondent jurors would bring a personal injury claim or may know someone who has brought a personal injury claim. Personal injuries claims are more common.⁷²

Whilst further research is required in order to ascertain which of the possibilities discussed above is the reason for the jurors' changes in preferred decision-maker amongst the four hypothetical questions, overall, the civil jurors were of the opinion that a jury is a preferable decision-maker for all four hypothetical civil disputes.

To avoid this pitfall of equating the jurors' opinions as truth, the empirical study conducted by the author incorporated opinions of the civil jury system from other perspectives. The value of including other subjects in the survey project is that they provide a form of triangulation that may or may not support the one-dimensional investigation of the civil jury system.⁷³

Judges and court staff are two groups with high exposure to the civil jury system. The judges and court staff (associates and tipstaff) were also questioned about their preferred decision-maker. The questions asked of the judges and court staff are identical to the questions asked of the jurors. The responses from the judges and court staff allowed comparison and consideration of whether experiences of

⁷⁰ (1993) 178 CLR 44, 58-9. The importance to the community of compensating individuals for physical injury is reflected in the fact that the government has developed a complex set of laws to ensure that employers honour their obligation to look after any injured employees. Lawyers will take on such a claim on a 'no win-no fee' basis. This is a claim available to all members of the community. Unlike a personal injuries claim, an ordinary member of the community is less likely to be involved in defamation litigation. There is no statutory scheme to ensure that every member of our community can avail themselves of their right to protect their good name. It would be unusual for a lawyer to take on a defamation proceeding on a 'no win-no fee' basis.

⁷¹ Edgeworth and Newcity, above n 69, 42-3.

⁷² There were 13 non-personal injury claims such as defamation claims pending in the Civil List of the Supreme Court of Victoria as at 31 December 2000. There were 27 personal injury claims pending for trial at the same date. See Supreme Court of Victoria, *Annual Report 2000* (2000) 22.

⁷³ Gary Edmond, 'Judging Surveys: Experts, Evidence and Social Problems' (forthcoming manuscript on file with author) 55.

the jury system from a different viewpoint result in a different opinion of the jury system. These two viewpoints will now be analysed and compared with the civil jurors' results.

E The Court Staffs' Preference of Decision-Maker

The court staff are in a unique position from which to observe the performance of the two alternative decision-makers. The court staffs' experience of the civil jury system differs from that of a judge or a jury. Whilst analysis of the judges' and jurors' responses must take into account the fact that the respondents are asked, to some degree, to self-analyse their performance as decision-makers, this potential lack of objectivity is removed when considering the responses received from the court staff.⁷⁴

Seventy-two per cent of the respondent court staff do not have any formal legal qualifications. Generally, they do not approach these questions from a lawyer's point of view. Unlike the judge, the court staff are not placed in a position of authority over the jury. In addition, the court staff are involved in assisting the jury with procedural matters during the course of the trial and deliberations. Consequently, they may often establish an intimate relationship with the jurors during the trial. The court staff are also likely to have a close relationship with the judges with whom they work on a daily basis. Part of the job description for all tipstaff and associates at the Victorian courts is that they attend court with the judge to whom they are allocated. The court staff have a unique advantage of being able to analyse the performance of the judges and the jury as decision-makers.

In order to allow a comparative analysis between the opinions of the court staff and jurors, the court staff were asked about their preference of decision-maker in the same series of hypothetical cases as presented to the jurors.⁷⁵ Whether the court staffs' experience of the jury system from a different viewpoint results in a different opinion on their preferred decision-maker was analysed.

The responses of the two groups were similar. There was one notable distinction between the responses of the court staff and the jurors. This was in response to a question asking the court staff to consider their preference if they were defendants/employers in a personal injuries claim.

Fifty-eight per cent (41) of the court staff respondents would opt for a judge if defending a work place personal injuries claim with 40 per cent (28) preferring a jury.⁷⁶ These results are more strongly in favour of a judicial decision-maker than

⁷⁴ Although, it must be acknowledged that the court staff may be influenced by the institutional habits of bureaucratic personnel.

⁷⁵ In 2001, there were approximately 167 associates and tipstaff employed by the Victorian Supreme and County Courts in Melbourne. Seventy-one responses were received from the court staff surveyed, amounting to a 42.5 per cent response rate. Almost half of the sample size is an acceptable response rate to enable some insight into the opinions of Victorian court staff.

⁷⁶ Two of the court staff who responded to the survey did not respond to this question.

the preferences recorded by the respondent jurors. Twenty-five per cent of respondent jurors opted for a judge and 60 per cent preferred a jury. However, the same distinct shift away from the judge towards the jury as the decision-maker is evident when the court staff were asked to consider the same case as a plaintiff rather than as the defendant. Seventy-three per cent (52) of all the court staff respondents would opt for a jury if they were an employee suing their employer for a work place injury, with 25 per cent (18) preferring a judge.⁷⁷ The respondent jurors equally preferred a jury in such circumstances.⁷⁸

In a hypothetical personal injuries dispute, there is a distinct shift away from a judge and towards a jury as the decision-maker, according to whether the hypothetical disputant was a plaintiff or a defendant. The court staff results recorded a swing of 16 per cent whereas the swing recorded in the juror responses was 13 per cent. The court staffs' perceptions of bias operating in the legal system was stronger than that of the jurors. The court staff either perceived that the jury is strongly pro-plaintiff and/or anti-defendant, or that the judge is strongly anti-plaintiff and/or pro-defendant. The operation of these biases have been discussed earlier in relation to the respondent jurors' perceptions of bias operating in the determination of civil claims.

In a hypothetical medical negligence claim, a total of 69 per cent (49) of all court staff respondents preferred a jury, with 28 per cent (20) preferring to trust their medical negligence claim to a judge.⁷⁹ This is not dissimilar to the juror responses, where 73 per cent preferred a jury and 14 per cent a judge. In a hypothetical defamation claim, 63 per cent (45) of the court staff said that they would prefer a jury with 35 per cent (25) opting for a judge.⁸⁰ The same question asked of the jurors recorded 63 per cent preference for a jury and 21 per cent for a judge.

In summary, the court staff showed their support for the effectiveness of the civil jury system by recording their preference for a jury for most civil jury cases. The consistency of response by the court staff to the four questions suggests that the court staff believe that a change in subject matter of the dispute makes little difference in the decision-makers' ability to determine the case. The stronger preference shown for a judge for the question posed as a defendant in contrast with the questions posed as plaintiffs suggests that the court staff perceive that either the jury is pro-plaintiff or the judges are pro-defendant in bias.

This conclusion is consistent with the results of the data collected from the respondent jurors in relation to the same questions. Exposure to the civil jury system by the court staff also resulted in confidence in jury decisions. The court staff are confident in the civil jury system although they did perceive that biases

⁷⁷ One of the court staff who responded to the survey did not respond to this question.

⁷⁸ Seventy-three per cent of jurors preferred a jury as decision maker with 14 per cent opting for a judge. The 11 per cent difference in result between the responses obtained from the jurors and the court staff is attributed to the high levels of 'no responses' received from the jurors.

⁷⁹ Two of the court staff who responded to the survey did not respond to this question.

⁸⁰ One of the court staff who responded to the survey did not respond to this question.

operate in the system. Whether the judges perceive that biases operate between parties to a civil dispute will now be considered.

F The Judges' Preference of Decision-Maker

A third party intimately involved in the civil jury system is the judge. Judges preside over all civil jury trials, which gives them the opportunity to analyse the jury's performance. The judge is also the alternative decision-maker posed in the questions asked of the survey respondents about their preferred decision-maker. The insight that the judiciary must gain from their intimate vantage point of the civil jury system requires consideration of their opinion on the subject. This section addresses the civil jury trial judges' stated preferences of decision-maker.⁸¹

An overall view of the responses to the hypothetical questions shows that of the 22 judicial responses, only two judges said that for all scenarios posed they would opt always for a judge. Four judges said that they would opt for a jury for all the hypotheticals asked. Two of the civil jury trial judges declined to answer the four hypothetical questions. The remaining 14 judges varied their responses according to changed variables in the questions.

The respondent judges showed confidence in the jury system by expressing their preference for a jury in three out of four of the hypothetical civil jury trial questions. The judges showed a preference for a jury to determine any personal injuries claim they would bring against their employer. Thirteen (65%) of the judges would prefer a jury in such circumstances. The level of endorsement of the jury recorded by the judges was, however, not as strong as the respondent jurors or the court staff.

Twelve (60%) of the judges preferred a jury to hear any medical negligence claim, and the same proportion preferred a jury for any defamation claim. Nine of the respondent judges (45%) were consistent with their preference for a jury for the personal injuries/employer claim, the medical negligence claim and the defamation action hypotheticals. The changing nature of the subject matter did not appear to influence those judges' preference of decision-maker.

⁸¹ Of the 84 judges contacted, 22 responded by completing and submitting the questionnaire (26.2% response rate). Consequently, the judge's opinions discussed in the author's empirical study cannot safely be considered to represent the opinions of all Victorian judges. However, not all judges have the opportunity to preside over civil jury trials. Due to increased specialisation of the judiciary, fewer judges are exposed to the civil jury system. In order to identify those judges with sufficient experience of the civil jury system, two threshold questions were asked in the judges' survey. The responses to these two questions show that the majority of judges who participated in this survey had extensive experience with the civil jury system. It is apparent from the responses received to the author's survey that the judges undertook their own self-selection process. Given that most respondent judges had extensive experience with civil juries, it is likely (*cont'd*) that judges with little civil jury experience chose not to return the questionnaire. Judges tend to specialise in hearing certain types of cases and are commonly characterised as criminal or civil judges. Therefore, given that there are approximately 69 civil jury trials every year in Melbourne, the 22 responses received from the judiciary are likely to be from Victorian civil jury trial judges. The judicial responses received could therefore reasonably be representative of the opinions of all Victorian civil jury trial judges. In this article, reference to judges in relation to the empirical study is a reference to Victorian civil jury trial judges.

The only hypothetical where the majority of the judges did not prefer a jury over a judge-alone trial was the one in which the judges were asked to be a defendant (employer) to a personal injuries claim. More respondent judges preferred that a judge rather than a jury determine this case. Seven (39%) preferred a judge as decision-maker, six (33%) preferred a jury as decision-maker, five (28%) showed no preference or did not know the answer to the question and two did not answer this question.

In comparing the two personal injury hypothetical questions, five of the judges shifted their preference from a jury when asked to be a plaintiff to a judge when asked to be a defendant. Five maintained their preference for a jury regardless of which party to the dispute they were asked to be. This shift is consistent with the shift of preference shown in the respondent juror and court staff surveys. Like the other respondents, some judges are of the opinion that biases do operate in one or both of the decision-makers. The strength of the civil jury trial preference for a judge as decision-maker was not as strong as that recorded by the court staff. The judges were on the middle ground between the jurors and the court staff in the level of support for a jury as decision maker in a work place personal injury claim.

The main finding of the comparative analysis of the preference of decision-maker questions is that jurors, judges and court staff all show a preference for a jury as a decision-maker in civil trials. I will now place this conclusion in the context of the contemporary and historical perspectives of the value and place of the civil jury system in Australia.

V CONCLUSION

The civil jury has wrongly been promoted to citizens as an ancient democratic right. Consideration of the history of the civil jury shows that the jury was initially used by the wealthy in civil cases to enhance their positions of power in the community. The notion that the civil jury is designed to protect the individual's basic democratic rights is relatively new. Whilst the argument that the civil jury has and therefore always will protect the individual's basic democratic rights is not historically accurate, the symbolic power of the civil jury to the contemporary Australian community should not be dismissed.

The civil jury symbolises a citizen's participation in the civil legal system. The fact that laypeople are involved in their own civil legal system serves to promote the perception that the civil laws are made 'by the people and for the people'. This contributes to the legitimacy of our civil legal system, which is a fundamental requirement for the proper functioning of a democratic community. At a time where the judiciary is suffering from the perception that it fails to adequately represent the community, jury participation is needed now more than ever to reverse this perception.

Australian citizens, in their role as civil jurors, are involved in moulding community laws in a number of ways. Civil jury decisions serve to decide cases between individual litigants. In this way, community attitudes on economically important cases are directly expressed in each verdict delivered. Such verdicts serve to educate the judiciary as to contemporary community values. The jury both educates the judiciary and insulates them from the allegation that the judiciary are out of touch with community standards, particularly in relation to important contemporary community issues such as product liability standards and corporate responsibility.

Civil jury decisions serve to shape precedent and consequently will also influence the behaviour of future litigants and their lawyers. Litigants and their lawyers are mindful of previous jury decisions when they attempt to settle their disputes before trial. In the twenty-first century, where corporations and governments are powerful, the moral authority of the civil jury is needed to influence and monitor business and government dealings. If juries were limited to criminal cases, our increasingly corporatised community would lose the important role of the civil jury as corporate regulator.

The Victorian civil jurors' positive image of the jury system, as conveyed by their responses to the author's survey, promotes the contention that jury duty is a worthwhile civic experience. The majority of respondent jurors view the jury system favourably. Jurors, judges and court staff all show a preference for a jury as a decision-maker in civil trials. These responses are consistent with a firm belief in the positive value of the civil jury system to the community.

The jurors' positive impressions of the civil jury system, as recorded in this survey, are likely to permeate throughout the community when the jurors return to their daily life and discuss this new experience with the people around them. This is evidenced by the fact that the majority of respondent jurors knew someone who had served on a jury. Jury duty does touch, directly or indirectly, a large proportion of the Victorian community.

The civil jury system provides positive exposure for the citizens of Victoria to its legal system. Approximately one third of respondent jurors said that their opinion of the jury system was more favourable following their experience of jury duty. This is a strong indication that the experience of jury duty is a good educational tool with which to educate citizens about the jury system. The educative quality of the experience of jury duty is strengthened by the fact that the civil jurors perceived that their jury experiences were worthwhile to them. This positive perception of the jury system also reflects well on the broader legal system, as jurors are able to observe how the legal system operates and are able to formulate views as to the competency of the judges and lawyers. The jury system forms a bridge between the community and the judicial system.

Being intimate with the vital elements of a democracy and why we, as a nation, strive to maintain a democracy, are difficult concepts to understand. The best way

to understand an institution is to participate in it. Involving citizens in a concept such as democracy, and relating the experience to real life, has a far greater impact than a mere verbal explanation. The importance of community participation in our democracy is reflected in the fact that Australia insists upon every citizen participating in the parliamentary process by compulsory voting. The importance of civic duty to our democracy is further emphasised by mandatory jury service. First-hand exposure to an institution that lies at the foundation of our democratic community must be perceived to be important to a democratic community. By their positive reaction to jury service, the respondent jurors showed their appreciation of their civic duty to the law. The positive experience that the respondent jurors had will also serve to promote community acceptance of the civil law, which in turn ensures community compliance.

However, the data obtained on the respondent jurors' attitudes towards the jury system cannot stand alone to successfully support the contention that the jury provides an important civic experience for the citizen. This is because many respondent jurors declared that they formed their opinion prior to sitting as a juror in 2001, and that their opinion remained unchanged following jury duty. This strong majority of responses suggest that the respondent jurors' education about the jury system is achieved not only through the direct experience of jury duty, but also through other means, be it by word-of-mouth, through criminal jury service, school education or information obtained from the media. Further research as to what factors influence community perceptions of the civil jury system would be worthwhile.

Regardless of the basis of the respondents' favourable opinions, the empirical data support the conclusion that jury service is perceived to be of value by the respondents. The value of jury service is strengthened by the fact that three quarters of all respondent jurors were willing to commit to further jury service in due course. Jurors valued their first-hand experience of their legal system. To be happy to serve again shows the strength of the respondents' belief in the value of jury service.

Another indicator that jurors have deep trust in the jury system, and in particular the civil jury system, is the strong preference shown for a jury trial in the series of hypothetical questions asked. The respondent jurors were of the opinion that juries are preferable to judges as decision-makers for civil disputes. The jurors voiced a strong preference for a jury to hear all their hypothetical civil cases.

The civil jurors were not alone in expressing their confidence in the civil jury system. Those who work closely with the civil jury system – judges and court staff – also regard the jury as a highly effective decision-maker. Whilst the court staffs' experience of the civil jury system differs from that of a jury member's experience, their responses to the same set of civil hypothetical cases were similar.

Given that it is likely that the respondent judges would consider themselves

competent decision-makers, the fact that the respondent judges would prefer a jury to hear their civil claims in three out of the four hypotheticals posed is a strong endorsement of the civil jury system.

Despite the acknowledgment of biases operating in the civil jury trial system, those familiar with the workings of the Victorian civil jury system are overwhelmingly of the opinion that the inclusion of the jury in resolving civil disputes is worthwhile. The results of the author's empirical study support the contention that the civil jury system promotes legitimacy of the legal system. The spreading of legal power within the community is healthy for a community.

Positive community experiences with the civil courts, that allow observations of the fairness of courtroom procedures, are likely to influence assessments of the legitimacy of the civil legal system. This will influence community acceptance of the civil laws of our community. The results of the empirical study show that the experiences of Victorian citizens acting as civil jurors are overwhelmingly positive. The results of the empirical study discussed in this article support the argument that the civil jury system promotes legitimacy of the legal system. In the words of one respondent juror, the civil jury system is 'a well run system and a good experience'.