

“GUARDIAN OF CIVIL RIGHTS . . . MEDIEVAL RELIC”[†]: THE CIVIL JURY IN CANADA

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I

INTRODUCTION

The civil jury in Canada dangles on a shoestring despite the fact that the available evidence indicates that it enjoys broad public support.¹ It exists in some jurisdictions in little more than name only, while in a few jurisdictions it has been abolished outright. However, in Ontario, the largest province, civil juries appear to be used more than in other provinces. In fact, there was strong reaction when the Ontario Law Reform Commission (“OLRC”) suggested in a recent Study Paper² that civil juries be drastically curtailed. As a result, the OLRC reversed itself and actually recommended expanding the use of lay decisionmakers.³ Nevertheless, juries in civil matters still exist only at the periphery, playing nowhere near the central role in administering justice as their counterparts in the United States.⁴ This article offers some explanations of why Canadian civil juries exist only at the margins by examining the availability of civil juries, empirical evidence regarding their use and cost in Ontario (the only province for which such information exists on a systematic basis), and academic and policy debates concerning their role.

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[†] Paul Romney, *From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture*, 7 L. & HIST. REV. 121, 138 (1989).

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1. See *infra* Part III.C.

2. ONTARIO LAW REFORM COMM’N, CONSULTATION PAPER ON THE USE OF JURY TRIALS IN CIVIL CASES (1994) [hereinafter OLRC, STUDY PAPER].

3. See ONTARIO LAW REFORM COMM’N, REPORT ON THE USE OF JURY TRIALS IN CIVIL CASES (1996) [hereinafter OLRC, REPORT].

4. In contrast, the jury plays a vital role in the administration of criminal justice in Canada. The right to a jury in a criminal trial (where the maximum punishment is five years or more) is constitutionally protected in the Charter of Rights and Freedoms (an entrenched bill of rights) enacted 15 years ago. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(f).

II

THE AVAILABILITY OF CIVIL JURIES IN CANADA

A. A Brief History of Civil Juries

Canada had imported the institution of civil juries from England before confederation in 1867. Initially, at least in Ontario, juries were mandatory in civil trials. Their obligatory use was seen as a safeguard against the domination of the courts by the merchant classes and served as a bulwark against threats to fundamental freedoms.⁵

Unfortunately, civil juries in Ontario suffered from abuses that limited their effectiveness. Sheriffs had absolute control in composing juror rolls, which led to frequent allegations of corruption and “packing” to favour the interests of those in the Sheriff’s office.⁶ After decades of such charges, Ontario adopted a comprehensive statutory reform of the jury system in 1850.⁷ However, in 1868, the presumption that civil trials were to be tried by a jury was reversed by passage of the Law Reform Act of 1868:⁸ Subject to a few exceptions, civil actions were to be tried by a judge unless one of the parties requested trial by jury.⁹

After the implementation of much-needed reform, criticisms of civil juries, once well-founded, were transformed into attacks on the institution itself. Opponents of the civil jury argued that trial by jury was too costly and time consuming, and they questioned the ability of lay people to grapple successfully with complicated legal and factual issues.¹⁰ As a result, the use of civil juries was drastically curtailed. Thus was established a tone of judgment from which the Canadian civil jury has never fully recovered: “Its reputed age-old role as guardian of civil rights and liberties was forgotten; suddenly it was a medieval relic, costly and inefficient, which continued to clog the machinery of justice only through the inertia of public will.”¹¹

B. Conditions for Civil Trial by Jury

Despite its tumultuous history, the civil jury is still available in Canada. However, its availability varies among the Canadian jurisdictions. Even those provinces that most widely encourage the use of juries still impose substantial conditions on their employment.

5. See OLRC, REPORT, *supra* note 3, at 5-6.

6. See Paul Romney, *From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture*, 7 L. & HIST. REV. 121, 130 (1989).

7. See OLRC, REPORT, *supra* note 3, at 5-6.

8. Law Reform Act of 1868, ch. 6, § 18(1), 1868-69 S.O. 18, 25 (Ont.).

9. See *id.*

10. See OLRC, REPORT, *supra* note 3, at 26-29.

11. *Id.* at 6 (quoting Romney, *supra* note 6, at 138).

At one end of the spectrum is Quebec¹² and the Federal Court of Canada,¹³ both of which unqualifiedly prohibit civil juries. Occupying the middle ground are provinces such as Alberta¹⁴ and Saskatchewan,¹⁵ where civil juries are available for certain types of claims. Generally, juries are available in cases in which the amount in controversy exceeds \$10,000. In Alberta, for example, such claims are limited to those in tort and those for the recovery of property valued in excess of \$10,000.¹⁶ In addition, in Saskatchewan, a jury may be ordered where: "(a) the ends of justice will be best served if findings of fact are made by representatives of the community; or (b) the outcome of the litigation is likely to affect a significant number of persons who are not party to the proceedings."¹⁷ Finally, at the other end of the spectrum are provinces like British Columbia¹⁸ and Ontario.¹⁹ Although jury trials are available there for certain kinds of actions, the list of excluded actions is significant and includes claims for equitable relief and claims against the crown and municipalities.²⁰

C. Judicial Attitudes Toward the Civil Jury

As seen above, the role of the civil jury, at minimum, is subject to significant limitations in all Canadian jurisdictions. This tenuous hold is partially attributable to hostile judicial attitudes. Except for the limited instances where juries are mandatory, judges retain discretion to conduct a trial without a jury. In addition, judges retain power to intervene in juries' verdicts. Examining cases where these powers have been invoked provides insight into the courts' understanding of the decisionmaking capacity of lay jurors and reveals that Canadian judges are at best ambivalent toward civil juries.

Canadian judges and justices have long saluted the importance of the civil jury, characterizing trial by civil jury as a "substantive right" not to be taken away except for "cogent reasons."²¹ Nevertheless, courts retain the ability to strike civil juries.²² In all provinces, a party may move to have a jury notice struck out,²³ and the judge may rule on the motion as an exercise of his or her discretion. The most frequently cited ground for eliminating the jury in a civil

12. See Jurors Act, ch. 9, § 56, 1976 S.Q. 59, 68 (Que.).

13. See Federal Courts Act, R.S.C., ch. F-7, § 49 (1985) (Can.).

14. See Jury Act, ch. J-2.1, § 16, 1982 S.A. 37, 44 (Alta.); ALBERTA RULES OF COURT 234, 235.

15. See Jury Act, ch. J-4.1, §§ 14-22, 1980-81 S.S. 53, 57-59 (Sask.); QUEEN'S BENCH RULES OF SASK. 196.

16. See *supra* note 14.

17. Jury Act, ch. J-4.1, § 17(1), 1980-81 S.S. 55, 58 (Sask.).

18. See Jury Act, R.S.B.C., ch. 210, §§ 13-21 (1979) (B.C.); Supreme Court Act, ch. 40, § 15, 1989 S.B.C. 327, 330 (B.C.); SUPREME COURT RULES 39(24)-(30) (B.C.).

19. See Courts of Justice Act, R.S.O., ch. C.43, § 108 (1990) (Ont.); RULES OF CIVIL PROCEDURE 47 (Ont.).

20. See *supra* notes 18, 19.

21. King v. Colonial Homes Ltd. [1956] S.C.R. 528, 533 (Can.); Such v. Dominion Stores Ltd. [1961] O.R. 190, 193 (Ont. C.A.).

22. See, e.g., Jury Act, ch. J-2.1, § 16(2), 1982 S.A. 37, 44 (Alta.).

23. See, e.g., RULES OF CIVIL PROCEDURE 47.02 (Ont.).

case is the undue complexity of the factual issues to be decided.²⁴ Less frequently, the judge eliminates the jury because of the potential for prejudice to a party arising from the determination of issues by laypersons.²⁵ Furthermore, judges have developed specific guidelines, almost all of which militate against juries and favour striking their use in certain circumstances.²⁶ Although most of these strictures have been removed or significantly loosened in the last two decades, courts in some provinces are inclined to make findings of complexity that result in juries being eliminated relatively easily.

Traditionally, courts restricted the use of juries in civil cases to guard against a jury becoming overwhelmed by "complexity" in cases involving complicated issues of law, medical malpractice actions, and in cases where the jury might discover that the defendant had insurance that would apply toward any adverse judgment. Recently, however, these categorical bars on the use of civil juries have been eliminated.

The first categorical bar previously recognized by Canadian courts occurred when the case involved complex legal issues. Although questions of law are left to judges, courts, particularly those in Ontario, have held that the presence of complicated issues of law in a case swamped the issues of fact, thus rendering the action inappropriate for determination by a jury.²⁷ However, appellate courts in Ontario recently have reasoned that because only judges decide legal questions, the complexity of the legal issues in an action are irrelevant to the appropriateness of trial by jury.²⁸

Another categorical bar to the use of the civil jury occurred in medical malpractice cases. Courts were reluctant to allow the use of juries in these cases because of the perception that the factual issues were too complex and that the risk of prejudice against doctors was too great.²⁹ By the 1970s, reservations expressed by Ontario courts about the use of juries to determine issues of negli-

24. This is underscored by legislation in some provinces. *See, e.g.*, SUPREME COURT RULES 39(27) (B.C.) (permitting the Court to strike out a civil jury where the issues require prolonged examination, scientific investigation, or are of "an intricate or complex character").

25. *See generally* 3 GARRY D. WATSON & CRAIG PERKINS, HOLMESTED AND WATSON: ONTARIO CIVIL PROCEDURE 47 §§ 12-14, at 47-24 to 47-27 (Oct. 1997).

26. In contrast, courts are disinclined to strictly review the means by which juries are selected. *See Hrup v. Cipollone* [1994] 19 O.R.3d 715, 723 (Ont. C.A.) (holding that failure to follow statutory stipulations for peremptory challenges is not a miscarriage of justice); *Thomas-Robinson v. Song* [1997] 34 O.R.3d 62 (Ont. Gen. Div.) (holding that the right to challenge potential jurors for cause, whether for racial bias or otherwise, does not exist in civil cases).

27. *See MacDougall v. Midland Doherty Ltd.* [1984] 48 O.R.2d 603, 606 (Ont. H.C.J.); *Fulton v. Town of Fort Erie* [1982] 40 O.R.2d 235, 237 (Ont. H.C.J.); *Damien v. O'Mulvenny* [1981] O.R.2d 448, 451 (Ont. H.C.J.).

28. *See Cosford v. Cornwall* [1992] 9 O.R.3d 37, 48 (Ont. C.A.); *Murray v. Collegiate Sports Ltd.* [1989] 40 C.P.C.2d 1, 3 (Ont. C.A.).

29. *See Law v. Woolford* [1976] 2 C.P.C. 197 (Ont. H.C.J.); *Kingbury v. Washington* [1925] 4 D.L.R. 632 (Man. C.A.). While the position in other provinces varied, only Alberta seemed to approach Ontario's hostility toward the use of juries in medical malpractice litigation. For a discussion of the various positions, see W.A. Bogart, *The Use of Civil Juries in Medical Malpractice Cases*, in *STUDIES IN CIVIL PROCEDURE* 1, 5-9 (Eric Gertner ed., 1979).

gence in medical malpractice cases led to their prohibition.³⁰ This prohibition was not based on any evidence suggesting that juries favoured plaintiffs in such cases or that juries are incapable of understanding factual issues in medical cases.³¹ But in the 1980s, Ontario courts dropped the strict rule against civil juries in such cases, although they retained the power to eliminate juries in specific cases deemed too complex or involving the potential for prejudice.³²

A final categorical bar recognized by Canadian courts occurred when the jury "might reasonably infer" that the defendant was insured against a finding of liability. In such cases, the Supreme Court held that the panel must be released.³³ The Court reasoned that jurors would be more likely to find liability if they knew that an insurer would pay any judgment against the defendant.³⁴ Although such reasoning may have been sound decades ago, compulsory automobile insurance and the prevalence of liability coverage in other areas calls into question an automatic assumption of prejudice so severe as to require the removal of the case from the jury. Indeed, in the face of silence concerning such matters, juries might well assume that the defendant is insured.³⁵ As a result, many lower courts have found ways around automatically releasing juries just because they had acquired information from which they "might reasonably infer" that insurance coverage played a role in the case.³⁶ In 1997, the Supreme Court put its imprimatur upon such efforts and abolished the rule.³⁷ Judges may now exercise discretion in determining whether to release a jury which has come to know that the defendant carries insurance that would cover any judgment against it.³⁸ Although such discretion is entirely defensible given the modern reality of ubiquitous insurance coverage, the prohibition against the mention of insurance continues to prevail in the United States.³⁹

Though these strictures against the use of juries have been eliminated or drastically modified, the authority to strike out a jury on the grounds of the complexity of the issues or potential prejudice to one of the parties continues. Courts employ this discretion to strike juries in many debatable circum-

30. See *Law* [1976] 2 C.P.C. at 197.

31. See Bogart, *supra* note 29, at 9-14.

32. See *Strojny v. Chan* [1988] 26 C.P.C.2d 38 (Ont. H.C.J.); *Anderson v. Wilgress* [1985] 6 C.P.C.2d 172 (Ont. H.C.J.); *Zeller v. Toronto Gen. Hosp.* [1984] 45 C.P.C. 221 (Ont. H.C.J.); *Soldwisch v. Toronto W. Hosp.* [1983] 43 O.R.2d 449 (Ont. H.C.J.); *Archibald v. Dixon* [1981] 24 C.P.C. 235 (Ont. H.C.J.); *Lalonde v. Sudbury Gen. Hosp. of the Immaculate Heart of Mary* [1980] 19 C.P.C. 147 (Ont. Dist. Ct.).

33. See *Bowhey v. Theakston* [1951] S.C.R. 679, 683 (Can.).

34. See *id.*

35. The Supreme Court's rule was widely criticized. See, e.g., JOHN SOPINKA, *THE TRIAL OF AN ACTION* 31-32 (1981).

36. See *Cameron v. Excelsior Life Ins. Co.* [1978] 27 N.S.R.2d 218 (N.S.S.C.T.D.); *Morin v. Rochon* [1983] 42 O.R.2d 301 (Ont. H.C.J.); *Alden v. Hutcheon* [1960] Q.L.R. 539 (Que. Q.B.).

37. See *Hamstra v. British Columbia Rugby Union* [1997] 1 S.C.R. 1092, 1106 (Can.).

38. See *id.*

39. See 1 MCCORMICK ON EVIDENCE § 201 (John W. Strong et al. eds., 4th ed. 1992), *cited in Hamstra* [1997] 1 S.C.R. at 1103.

stances.⁴⁰ Nevertheless, courts of some provinces are more inclined to exercise this discretion to strike a jury demand than others. Alberta, where civil jury trials are rare, stands out. A search of cases decided in Alberta in the 1990s reveals four judgments in which the application for a jury was denied on the ground of complexity, which is a significant number given the otherwise few cases in which there is a jury.⁴¹

Furthermore, courts retain the authority to interfere with the judgment of a jury once it has reached its verdict.⁴² Yet, in contrast to the penchant of some courts to dispense with lay decisionmakers, judges express substantial deference to juries once they have completed their task. Appellate courts consistently have held that it is only in limited circumstances—when there is no evidence to support the findings or the verdict cannot in law be a foundation for judgment—that the trial judge can disregard a jury's verdict.⁴³

Moreover, the Ontario Court of Appeal seems disinclined to respond to even a legislative invitation to substitute its views for that of a civil jury. A recently enacted law empowers appellate courts to substitute their own assessment of damages on appeal in both jury and bench trials.⁴⁴ Nevertheless, the Ontario Court of Appeal has decided that, where the jury has awarded damages, the court will not interfere with the award unless there has been a "wholly erroneous estimate of the damages."⁴⁵

D. Academic Attitudes Toward the Civil Jury

Another factor possibly explaining the (non)use of the civil jury is academic influence. Academic legal education in Canada, particularly in Ontario, is of comparatively recent origin. Until the 1950s, lawyers were largely educated as apprentices. One of the main architects of academic legal education was Cecil Wright, a tort scholar. Wright was adamantly opposed to civil juries, viewing them as ill-equipped to respond to the many theoretical and policy arguments essential to the development of tort law and policy.⁴⁶ Wright had tremendous influence and may have inculcated in several generations of lawyers a deep

40. See *Babyn v. Patel* [1997] A.J. No. 261 (Alta. Q.B.) (striking jury because of difficult issues of causation and the likelihood of conflicting expert testimony); *Taguchi v. Stuparyk* [1993] A.J. No. 843 (Alta. Q.B.) (striking jury because the trial would involve lengthy examination of documents and actuarial reports as well as much conflicting expert testimony).

41. See *Babyn* [1997] A.J. No. 261; *Sharma v. Smook* [1996] A.J. No. 22 (Alta. Q.B.); *Baker v. Suzuki Motor Co.* [1993] A.J. No. 240 (Alta. Q.B.); *Meyer v. Royal Bank of Canada* [1993] A.J. No. 705 (Alta. Q.B.); *Taguchi* [1993] A.J. No. 843. But see *Wilton v. Royal Bank* [1991] A.J. No. 770 (Alta. Q.B.).

42. See *Malloch v. Moenke* [1996] B.C.J. No. 399 (B.C.C.A.); *Hill v. Church of Scientology* [1992] 7 O.R.3d 489, 498 (Ont. Gen. Div.); *Loffredi v. Simonetti* [1988] 29 C.P.C.2d 10, 15 (Ont. Dist. Ct.).

43. See cases cited *supra* note 42.

44. See Courts of Justice Act, R.S.O., ch. C.43, § 119 (1990) (Ont.) ("On an appeal from an award for damages for personal injury, the court may, if it considers it just, substitute its own assessment of the damages.").

45. *Koukounakis v. Stainrod* [1995] 23 O.R.3d 299, 305 (Ont. C.A.).

46. See Edson L. Haines, *The Future of the Civil Jury*, in *STUDIES IN CANADIAN TORT LAW* 10, 10-11 (Allen M. Linden ed., 1968) (recounting Wright's hostility toward the civil jury).

skepticism about the role, if any, that civil juries should play in the administration of civil justice.⁴⁷

Another academic perspective, developed in the 1970s, came to view civil litigation as an ill-suited mechanism for providing compensation and effecting deterrence in most areas of torts.⁴⁸ Scholars in this school of thought instead looked to the administrative state to provide redress, at least in the area of personal injuries.⁴⁹ For example, they advocated expanded versions of worker compensation programs, no-fault regimes for automobile accidents, and compensation for damages suffered as a result of medical treatment.⁵⁰ They were also largely unenthusiastic about civil juries, seeing them as inextricably linked to a system of tort adjudication that should, by and large, be abolished.⁵¹ Some judges may agree with the view that juries are part of an outmoded system of compensation for personal injuries. In any event, judges might emphasize the burden on the judiciary in preparing what are contended to be long and intricate charges to civil juries.⁵²

Whatever the merits of the stance taken by either Wright and his acolytes, on the one hand, or those advocating administrative regimes, on the other, these positions were highly influential in law and particularly legal policymaking. The civil jury for a very long time, especially in Ontario, thus had very few advocates among those in a position to recast the civil justice system.

III

SOME EMPIRICAL EVIDENCE: THE USE AND COST OF CIVIL JURIES IN ONTARIO

It is one thing to detail how the courts—or anyone else—believe civil juries should be employed. It is quite another to determine empirically the frequency with which they are used, in what category of cases, and at what cost. Research on the use of juries in most provinces is essentially educated guesswork. In some provinces, such as Manitoba, there were no civil jury trials for extensive periods of time.⁵³ In British Columbia, the frequency of use of the civil jury has

47. See OLRC, REPORT, *supra* note 3; 2 ONTARIO, ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS: REPORT NUMBER ONE 859-60 (1968).

48. For a critical yet sympathetic evaluation (based on empirical studies) of this position, see DON DEWEES ET AL., EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY (1996).

49. See *id.*

50. See *id.*

51. See OLRC, REPORT, *supra* note 3. The Commission relied heavily on the advice of academics in coming to its recommendations in these studies. In addition, the leading casebook on civil procedure, GARRY D. WATSON ET AL., CIVIL LITIGATION: CASES AND MATERIALS (4th ed. 1991), contains only a few scant references to civil juries. See, e.g., *id.* at 280. Indeed, it is not an exaggeration to say that academics have ignored the civil jury, largely hoping it would go away.

52. Letter from Justice B.T. Granger, Regional Senior Justice, Ontario Court of Justice (Feb. 23, 1998) (on file with author).

53. See OLRC, REPORT, *supra* note 3, at 16-17.

been estimated at between three and ten percent.⁵⁴ The OLRC tried to discover such facts, with regard to Ontario, in its recent report on the civil jury.⁵⁵ Due to the state of the records used as the basis of this study, caution is required when examining its findings.⁵⁶ On the other hand, the OLRC report provides the only current, systematic attempt at assembling facts regarding the use of juries in any province.

A. The Use of Civil Jury Trials in Ontario

Although the use of civil juries in Ontario had been declining in recent decades, over the last several years their employment has increased by about seven percent.⁵⁷ Specifically, civil jury trials have generally increased from fifteen percent in 1988-89 to twenty-two percent in 1994-95.⁵⁸ Further breakdown of these figures indicates that approximately three-quarters of all civil jury trials involve claims arising from motor vehicle accidents.⁵⁹

B. Expense of Civil Jury Trials in Ontario

There is a widely held perception that jury trials take longer and cost more than bench trials.⁶⁰ The accuracy of this view depends on whether the trial is concluded and how one determines the cost. The OLRC found that this perception is correct for those actions in which the trial is concluded.⁶¹ It determined that the median length of trials determined by jury verdict exceeds by three-quarters of a day the median length of bench trials.⁶² However, when cases that go to trial but settle before their conclusion are included, the average length of jury trials is less than that of bench trials.⁶³ This reflects the impact that juries have in promoting settlement: More jury cases settle prior to trial,

54. *See id.*

55. *See id.*

56. The OLRC study indicates that justice system statistics in Canada, generally, and in Ontario, in particular, are not what they should be. *See also* RODERICK A. MACDONALD, STUDY PAPER ON CIVIL JUSTICE 20-23 (1995); W.A. Bogart et al., *Current Utilization Patterns and Unmet Legal Needs, in 2 REPORT OF THE ONTARIO LEGAL AID REVIEW, A BLUEPRINT FOR PUBLICLY FUNDED LEGAL SERVICES* 316 (1997).

The researchers candidly acknowledge that they experienced significant difficulties, including establishing precisely how many jury trials actually took place in the last several years as opposed to actions in which a jury trial was scheduled but, for whatever reason, was not heard. *See* OLRC, REPORT, *supra* note 3, at 43-45.

57. *See id.* at 8.

58. *See id.* at 8-9. Statistics are last available for 1994-95.

59. *See id.* at 9. This despite the fact that motor vehicle litigation in Ontario has declined in the last few years because of a move away from tort-based litigation to an administratively based "no-fault" regime with exceptions for severe and permanent injuries. *See* INSURANCE BUREAU OF CANADA, FACTS OF THE GENERAL INSURANCE INDUSTRY IN CANADA 8-9 (1997); ALLAN O'DONNELL, AUTOMOBILE INSURANCE IN ONTARIO 229-50 (1991).

60. *See* OLRC, REPORT, *supra* note 3, at 26-27.

61. *See id.* at 54-55.

62. *See id.*

63. *See id.* at 55.

and the jury cases that reach trial settle earlier than bench-trial cases that settle.⁶⁴

With respect to the cost of a civil jury, the OLRC concluded that the jury is not as expensive as is widely thought.⁶⁵ There are several reasons why the jury might, in fact, be less costly. For example, the OLRC concluded that the administrative costs it identified and totaled were not substantial.⁶⁶ In addition, civil actions set to be tried by juries result in less courtroom time overall because of the higher rate of settlement and an apparently lower rate of appeal.⁶⁷

C. Experience of Jurors

The OLRC found that citizens of Ontario generally approve of the use of the civil jury.⁶⁸ Perhaps of even greater importance, the study reports findings that actual jury service increases approval. The OLRC studied the experience of jurors by surveying former jurors and those who were part of civil jury panels but who did not actually serve.⁶⁹ Of those who had a favourable impression of the jury before serving, 40.2% had a more favourable impression after serving on a jury, while only 20.2% had a less favourable impression.⁷⁰ This finding apparently is consistent with an American study that found that sixty-three percent of jurors reported having a more favourable attitude to jury duty after serving.⁷¹

Respondents to the survey were also asked whether they thought the jury should be available for most civil trials, and whether they would seek a civil jury for an action in which they were a party. Most, 64.5%, were in favour of the continued availability of the jury for most civil actions.⁷² For an action in which they were a party, 61.6% stated that they would prefer a judge and jury, thirty percent stated that they would select a judge alone, and 8.4% stated that their decision would depend on the particular case.⁷³

IV

ARGUMENTS ABOUT CIVIL JURIES

The OLRC report on civil juries conveniently summarizes the perceived strengths and weaknesses of this institution.⁷⁴

64. *See id.* at 54-56.

65. *See id.* at 55.

66. *See id.* at 56.

67. *See id.* at 55-56.

68. *See id.* at 69.

69. *See id.* at 63-73.

70. *See id.* at 69.

71. *See id.* at 70 n.52 (citing Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282 (Robert E. Litan ed., 1993)).

72. *See id.* at 71.

73. *See id.*

74. *See id.* at 19-30.

A. Arguments Favouring the Civil Jury

1. *Safeguard Against the Abuse of Power.* One reason identified by the OLRC as justifying the civil jury is that the jury is viewed as the bulwark against misuse of official power.⁷⁵ This notion finds its most robust expression in the institution of criminal juries. It also could be applied in civil matters in areas concerning misdirected activities of government. The difficulty, however, is that the use of juries often is forbidden in such matters. For example, in Ontario, lay decisionmakers are statutorily precluded in actions against all levels of government: federal, provincial, and municipal.⁷⁶ Notably, the OLRC has recommended the removal of statutory proscriptions against the use of juries when governments are sued.⁷⁷

Some proponents of the jury system have argued that juries are also a safeguard against abuse of power by protecting litigants from judicial bias.⁷⁸ The OLRC, however, found no evidence that litigants systematically believe that judges are biased.⁷⁹ On the other hand, the OLRC did find that some lawyers occasionally choose juries in order to avoid particular judges who they believe would not afford their client a good hearing.⁸⁰

2. *Due Process, Community Standards, Law Reform.* Another reason identified by the OLRC as justification for the civil jury is that juries uphold the administration of justice by permitting the law to treat each case as unique while reflecting contemporary community standards.⁸¹ This argument is particularly relevant in defamation and false arrest and imprisonment actions, because of the need to apply contemporary community standards in such cases. Others contend that this argument supports the use of juries in a wide range of cases because lay decisionmakers are a strong protection against assembly-line justice.⁸²

3. *The Jury as Catalyst.* A third reason justifying the use of the civil jury is that juries promote settlement and thereby save cost and time in the administration of justice.⁸³ As discussed earlier, the OLRC has found evidence supporting this conclusion.⁸⁴ However, doubters of lay decisionmakers argue that these economies stem merely from the jury's unpredictability—litigants settle out of fear of the gyrations that take place in the jury room.⁸⁵

75. *See id.* at 19.

76. *See id.* at 20.

77. *See id.* at 82-83.

78. *See id.* at 20.

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.* at 23.

83. *See id.*

84. *See supra* Part III.B.

85. *See* OLRC, REPORT, *supra* note 3, at 23.

4. *Competence.* A fourth reason cited by the OLRC as justification for juries is that group decisionmaking by juries is as good as or superior to solo decisionmaking by judges.⁸⁶ Psychological studies support this contention, particularly regarding credibility findings and damage assessments.⁸⁷ In addition, studies based on archival investigations and interviews with judges suggest that there is as much as an eighty percent overlap between what juries decide and what judges would have decided in the same cases.⁸⁸ Such studies, and the difficulty of establishing the “correct” outcome in a disputed case, suggest that, at the least, it is difficult to disprove arguments that juries are as competent as judges at determining factual issues.

5. *Confidence in Fair Treatment.* Another reason cited by the OLRC as justification for juries is that a decision from representatives of the community is more likely to be accepted by the public than a decision from a judge alone.⁸⁹ For example, a survey of former jurors found that many prefer the decisionmaking of juries to that of judges.⁹⁰

6. *Participation.* A sixth reason cited by the OLRC as justifying the civil jury is that jury duty provides citizens with an opportunity to participate in the administration of justice.⁹¹ Such activity underscores a commitment to the fundamentals of society. Nevertheless, skeptics point out that only a small percentage of individuals actually serve on a jury.⁹² Moreover, since juries are most often used in cases involving motor vehicle accidents, the beneficial effects of jury service are questionable. On the other hand, the very day-to-day nature of such cases may allow citizens to relate more easily to the justice system.

7. *Burden of Proof.* Finally, proponents of the civil jury insist that the public burden of persuasion is on those who would abolish it.⁹³ They cite two reasons for this contention. First, civil juries claim the protection of a long history and tradition.⁹⁴ Second, contemporary values regarding society contain strong elements of both skepticism toward government and a claim of direct citizen participation.⁹⁵

86. *See id.* at 23-24.

87. *See id.* at 23 (citing CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY (1962)).

88. *See id.* at 24 (citing HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY 58 (1966), and Harry Kalven Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065-66 (1964)).

89. *See id.*

90. *See id.* at 63-75.

91. *See id.* at 25-26.

92. *See id.* at 25.

93. *See id.* at 26.

94. *See id.*

95. *See id.*

B. Arguments Against the Civil Jury

1. *Cost-Benefit.* One reason cited by the OLRC for abolishing the civil jury is that any benefits that civil jury trials bestow are outweighed by their costs.⁹⁶ Jury trials are contended to be more lengthy and more expensive than bench trials. However, as discussed earlier,⁹⁷ the existing evidence throws this argument into question. Jury trials do not appear to be more time consuming, especially taking into account those actions which are settled during trial. Moreover, as also discussed earlier,⁹⁸ studies undertaken by the OLRC do not support the conclusion that jury trials cost more, or at least substantially more, than bench trials.⁹⁹

2. *The Jury as Tactic.* Another reason suggested for abolishing the civil jury is that juries allow parties to gain an unfair tactical advantage.¹⁰⁰ Juries are sought by those with weak cases because they feel the unpredictability of jury outcomes will promote settlement or will allow some emotional appeal to succeed.¹⁰¹ Institutional defendants, particularly insurance companies, select jury trials because juries in Canada award lower damages than do judges.¹⁰²

Proponents of juries reply that, at a general level, there appears to be congruence between juries and judges;¹⁰³ juries are not any more unpredictable than judges in reality. Additionally, the mere fact that a rule gives one side a tactical advantage is not, in itself, a reason to abandon the rule—after all, the adversary system is premised on tactics. Finally, while there is evidence that juries do award lower damages than judges, there is no evidence to suggest that juries are awarding damages outside an acceptable range, whether established by experts at trial or otherwise.¹⁰⁴

3. *Competence.* A final argument cited by the OLRC for abolishing the civil jury is that juries are not competent decisionmakers.¹⁰⁵ In support of this contention, the OLRC points to the alleged unpredictability of juries and their inability to understand the evidence.¹⁰⁶ However, assumptions about the uncertainty of jury verdicts and the jury's failure to understand the evidence

96. *See id.* at 26-27.

97. *See supra* Part III.B.

98. *See* OLRC, REPORT, *supra* note 3, at 26-27.

99. *See id.* at 27.

100. *See id.* at 27-29.

101. *See id.* at 27-28.

102. *See id.* at 28.

103. *See id.*

104. *See id.*

105. *See id.* at 29.

106. *See id.*

are questionable for the reasons just discussed.¹⁰⁷ Furthermore, judges retain the authority to strike out a jury altogether in cases with complex factual issues.

V

CONCLUSION: ASSESSING THE ARGUMENTS

The OLRC began its canvassing of the arguments relating to juries with some important observations. At base is its suggestion that promoters and skeptics of the civil jury are prompted by values that are hard to test empirically and difficult to reconcile in terms of basic views regarding the administration of justice.¹⁰⁸ For example, the OLRC correctly observed that there is no agreement about the criteria that should be used to measure the performance or contribution of judges or juries.¹⁰⁹

Nevertheless, in assessing the arguments, we can begin with what we do know about the civil jury:

(1) The civil jury is rarely used in some provinces, while in others its use appears to range from three to ten percent of civil trials. In Ontario, where the most systematic study has been done, juries are used in about twenty percent of civil cases.¹¹⁰

(2) Juries are employed primarily in tort cases, the vast majority of which are motor vehicle accident cases.¹¹¹ In such cases, juries are often sought by institutional litigants such as insurance companies.¹¹²

(3) Civil jury trials that go to completion do take somewhat longer than bench trials. However, because of the effect that the presence of a jury has on settlement rates, jury trials take less time overall.¹¹³ Moreover, there is no clear evidence that civil jury trials cost substantially more.¹¹⁴

(4) Juries tend to award damages that are lower than those of judges, but jury verdicts remain within appropriate ranges.¹¹⁵

(5) The use of civil juries is circumscribed. First, the statutory proscriptions against their use vary among the provinces, but include prohibitions for suits against governments, for domestic issues, and for claims for equitable relief.¹¹⁶ Second, judges retain discretion to strike out juries, most prominently on the ground of factual complexity.¹¹⁷ In some provinces, this power has recently been limited by

107. *See id.*

108. *See id.* at 30.

109. *See id.*

110. *See supra* text accompanying notes 53-59.

111. *See supra* text accompanying note 59.

112. *See supra* text accompanying note 102.

113. *See supra* text accompanying notes 60-64.

114. *See supra* text accompanying notes 60-67.

115. *See supra* text accompanying note 102.

116. *See supra* text accompanying notes 12-20.

117. *See supra* text accompanying notes 27-32.

the courts, while in others the general authority to strike out a jury continues to be employed quite readily by judges.

Civil juries are not widely used in Canada. However, there is no clear evidence that their use imposes any burden on the justice system or that their verdicts are aberrant. At the same time, the use of lay decisionmakers is limited in significant ways, with the result that juries are mostly used in litigation arising out of motor vehicle accidents and are frequently sought by institutional parties. Yet, if those boundaries were removed, or at least loosened, the use of juries very well could increase.

Nowhere are the contradictions regarding the civil jury more clearly apparent than in Ontario. Civil juries appear to be used most frequently in that province, despite the stringent qualifications on their use and the systematic opposition to their existence by official reports.¹¹⁸ The Ontario Law Reform Commission has been especially prominent in its opposition. In numerous reports over several decades, it has consistently opposed the use of the civil jury.¹¹⁹ As indicated earlier, in its most recent assessment of the role of lay decisionmakers, it suggested again that civil juries be abolished.¹²⁰ However, this suggestion created such a strong reaction that the OLRC changed its position and actually recommended expansion of the role of civil juries.¹²¹ Similarly, in the 1980s, the Ontario legislature, prompted by the OLRC, enacted legislation clearly authorizing appellate courts to modify jury awards in some circumstances.¹²² Yet the response by the Court of Appeal has been to indicate that it will overturn jury verdicts only in extreme instances.¹²³

A “guardian of civil rights”? A “medieval relic”? The civil jury in Canada is some of each. What is more, it is an institution that has simply fallen into disuse. In this regard, civil juries stand in marked contrast to the critical—and constitutionally entrenched¹²⁴—role that juries play in the administration of criminal justice. Furthermore, there are no compelling policy reasons, or justifications based on costs, that can establish the case for consigning the jury to such a small role in the administration of civil justice.

Perhaps it is appropriate to end on a note of irony regarding the ill-fitting civil jury. The OLRC, the institution that worked for so long to bring about the

118. See 2 ONTARIO, *supra* note 47, at 859-60.

119. See, e.g., ONTARIO LAW REFORM COMM'N, REPORT ON CLASS ACTIONS 461 (1982); ONTARIO LAW REFORM COMM'N, REPORT ON PRODUCTS LIABILITY 102-04 (1979); ONTARIO LAW REFORM COMM'N, REPORT ON THE ADMINISTRATION OF ONTARIO COURTS—PART I, at 329-50 (1973). *But see* MANITOBA LAW REFORM COMM'N, REPORT OF THE ADMINISTRATION OF JUSTICE IN MANITOBA PART II—A REVIEW OF THE JURY SYSTEM 48-50 (1975).

120. See OLRC, STUDY PAPER, *supra* note 2.

121. See OLRC, REPORT, *supra* note 3.

122. See Courts of Justice Act, R.S.O., ch. C.43, § 119 (1990) (Ont.).

123. See *Koukounakis v. Stainrod* [1995] 23 O.R.3d 299, 305 (Ont. C.A.).

124. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(f).

end of the civil jury, was abolished in 1996¹²⁵—a victim of governmental austerity and the politics of law. The civil jury, at least, continues to survive.

125. The OLRC has never formally been abolished, for example by having its statutory authorization repealed. Rather, it has been ended by the government refusing to fund it. *See* ONTARIO LAW REFORM COMMISSION (revised May 1998) <<http://www.attorneygeneral.jus.gov.on.ca/olrc/olrhome.htm>>.