WHY THE ONSLAUGHT IN ONTARIO ON JURY TRIALS?

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There has been a concerted backlash against trials by jury in Ontario. It is restricted to civil juries, apparently the life and liberty of citizens facing criminal charges being of less concern. The genesis of the campaign is difficult to pinpoint in time. It is fair to say that, whereas twenty years ago Plaintiffs' counsel routinely served a jury notice, today it is more the exception than the rule. What we do know is the campaign against civil juries is being championed by special interests, including the plaintiffs' personal injury bar. Juxtapose this against the following:

"The civil jury is under attack in Ontario. Bruised and battered by repeated onslaughts upon its integrity, the jury system is gradually falling into disrepute. The charges levelled against juries are varied: because they are easily influenced by emotional appeals, *they tend to find for the Plaintiff*; because they are Plaintiff-minded they tend to award damages that are too high; because they are laymen, inexperienced in the law, the pace of litigation is slowed down. There are other criticisms as well, in the realm of values, upon which men may understandably differ, but the main thrust of the attacks have been factual in nature. In spite of this, these accusations have not been supported by any empirical data."

The above excerpt was authored in 1968 by Professor Linden as a postscript to the *Osgood Hall Study on Compensation for Victims of Automobile Accidents*. It can be fairly said that the campaign against juries in 1968 was not promulgated by the Plaintiff personal injury bar of the day.

While there are nuances to the current onslaught, the reasons are strikingly similar to the charges levelled fifty years ago. The current justification for the affront to the longstanding substantive right to a trial by jury has been framed in the jury's inability to "handle the truth", its lack of medical expertise, its inability to unravel complexities, the widespread availability of information via modern technology and the added cost of trial by jury.

The Plaintiffs' bar is not alone in questioning the ongoing role of the civil jury. A Superior Court Judge, in *Mandel*, has chimed in, offering:

"While jury trials in civil cases seem to exist in Ontario solely to keep damages awards low in the interest of insurance companies, rather than to facilitate injured parties being judged by their peers, the fact is that the jury system is still the law of the land. This jury has spoken and did so loud and clear."

There was no evidence led at trial that jury awards are kept low at the behest of insurance companies. Jurors are not polled or questioned on their reasoning. It would be shocking to learn that a juror aligns with big cuddly insurance companies as opposed to the citizenry; unless, of course, the particular citizen is a poor historian, or loose with the truth. Jurors seem to like those of that ilk less than insurers.

Piling on is commentary from the Ministry of the Attorney General's office in Ontario, which has publicly stated that it is an "*unfortunate* reality that insurers in most negligence actions require their counsel to deliver a jury notice", reasoning that "the strategy is to increase the risk to which the plaintiff is exposed." How can electing a longstanding mode of the plenary trial to proceed be *unfortunate*? How is that statement reconciled with the Government of Canada's position on the "Role of the Public" in the justice system? Even before the advent of modern democracy, trial by a jury of ordinary people reflected a seismic shift from the top-down justice administered by a Crown or state appointee. Today, testifying in court as a witness or sitting as a juror are specifically identified as the role of the citizen.

The attack on civil juries is not limited to Ontario. There has long been a move afoot in the U.S. to restrict civil jury trials. The perception of many, or at least some, is that charge is being led south of the border by, "Corporations and other powerholders who are held accountable by the civil jury are striving to weaken, limit and override the province of juries pursuant to a wholesale jettisoning of civil juries in large categories of cases. Some of their companies, *led by insurers*, have used expensive and focused media to persuade public opinion that civil juries are too costly to tolerate in their present state of access."

While there are accounts of juries dating back to 7th century B.C. Greece and Egypt our

jury system in Ontario came to us directly from Britain when Ontario was then known as Upper Canada. Little has changed since the late 1700s.

The Supreme Court of Canada, in *Sherratt*, has said, “Importantly, the development of the institution known as the jury and the process through which it came to be selected was neither fortuitous nor arbitrary but proceeded upon the strength of a certain vision of the role that body should play.” It added that most early rationales for the use of a jury remain as relevant today as centuries ago, and adopted rationale set forth by the Law Reform Commission of Canada (1980) for the past and continued reverence for the jury (in a criminal context, at least):

- The jury through collective decision making is an “excellent” fact finder. (*Does the jury’s excellence wane in a civil context?*)
- Due to its representative character it acts as the conscience of the community. (*Is a jury any less the conscience of a community in the civil context?*)
- The jury can act as a final bulwark against oppressive laws. (*Surely it can be argued there is such a creature as an oppressive civil law*)
- The public can increase its knowledge of the criminal justice system by means of the jury. (*Ditto for the civil justice system*)
- By involving the public a societal trust in the system is developed. (*Ditto for the civil justice system*)

What of the current attack on juries? Only a suspension of disbelief would allow anyone to think anything but that it is motivated entirely by the notion that jurors tend to find for the Defendant and/or damages awards are too low – the converse of the attack of a half century past. As was the case in 1968, there is no empirical data supporting the attack.

But can jurors handle the truth? Of course they can. But what “truths” should it be asked handle when arriving at a verdict. Let us accept the following as truths about a particular Defendant in a motor vehicle tort claim:

- he has an opulent vacation home in the Caribbean;

- he is a cruel and authoritarian father who belittles his children and verbally abuses his wife;
- he has insurance coverage for a damage award;
- he has a peculiar porn fetish that many would find vile;
- he has an astonishingly wealthy aunt with whom he is close (unrelated to the above fetish);
- he donates millions of dollars to Third World causes.

While some of the above "truths" would be relevant at a judgment debtor examination, none are "truths" that can properly be led as evidence at the trial of a personal injury tort action. Jurors are only to be asked to consider "truths" that are relevant to the action. Who pays the judgment is entirely irrelevant, as are the Defendant's proclivities and comforts.

Where the insurer is not named in the lawsuit there are, then, no allegations made against it in the Statement of Claim. It is the named Defendant who is accused of causing fatal injuries, driving while intoxicated, failing to maintain his or her property so it safe for others to enter and the like. The Defendant, not the insurer, must answer to those allegations. As any who have prepared a Defendant for trial or examination will know, most take the allegations very personally. If Plaintiff's counsel tries to cozy up to the Defendant saying it is "nothing personal", ask if the allegations of the Defendant causing fatal injuries or keeping premises unsafe are being withdrawn. If not withdrawn it is deeply personal.

A jury is also not told about a deductible in the order of $38,000 that the *Insurance Act* requires the Trial Judge to deduct from a jury's assessment of pain and suffering damages in an automobile claim. It is a "truth", but is also a matter of law. The deductible is part of an act passed by our Provincial Parliament. If citizens, including lawyers, believe the deductible is unfair and ought not be the law, the remedy is not to ask jurors to artificially inflate their assessment of damages to usurp the role of the Trial Judge or flout legislation. The solution is to redirect the vigor trained on abolishing civil juries and write your MPP about what you view as an unjust law.

The suggestion that juries are not qualified to assess damages in an injury case because jurors have no medical training is ignoring a glaring reality: no trier of fact (neither judge nor

jury) necessarily possesses any specific expertise in medicine. I am unaware of any doctor who has moved on to don a red sash. Even if the trier of fact has a medical background (far more likely with a juror than a judge), does that make him or her better able to assess damages? The assessment of damages is a fact-based undertaking which must be completely grounded in the trial evidence, not on the trier of fact's prior experience or outside education. Damages are what the community says they are. A sole judge does not have a monopoly on the pulse of the community, and ought not have a monopoly on damages awards.

There is no evidence of what, if any, costs are burdened on the civil justice system by having juries available. A study in the United States by Dean Joiner proffers that a jury trial is no more time consuming than judge alone trial. It is proposed that this is because the Trial Judge must enforce the rules of evidence more strictly, shortening the trial in some ways and promoting a firm grasp of the law of evidence by counsel at the same time. Requests for adjournments or indulgences are less likely granted. The gatekeeping function of restricting expert testimony is exercised with greater vigilance. A decision is not delayed for days, weeks or months. An appeal is less likely.

Even if an added cost was quantifiable, it must be measured in light of what the jury trial that settled saved the justice system from what appears to be a cost that cannot be measured. The Ontario Ministry of the Attorney General reported that in 2005 and 2006 there were 6,839 civil trials, 1,598 (23%) of which were decided by jury. Does that mean that more actions to be tried by judge alone are brought to judgment, with jury actions much more likely to settle? Maybe. Maybe not.

There are even fewer civil jury trials proceeding under the simplified rules, 30 in a recent year, 22 of which were injury cases. Soon there may be none, with an amendment to amend our rules currently tabled for consideration with the Attorney General.

Given the paucity of civil jury trials in Ontario, it is a wonder that the topic has spurred the debate it has. Absent any hard evidence of the added costs of jury trials and setting aside the compensation-hungry assertion that jurors are incapable of, or far less capable of, justly deciding a case, the debate should end. Perceived imperfections or deficiencies are

insufficient to justify the abolition of an institution of justice by one's peers that has stood the test of time over centuries of adjudication.