DCLC
Durham Community Legal Clinic

June 15th, 2020

Ms. Amanda Iarusso
Director of Policy and Legal Affairs,
Ministry of the Attorney General
McMurtry-Scott Building, 720 Bay St,
Toronto, ON M7A 2S9

Dear Honourable Doug Downey,

Re: The Question of Civil Juries in Ontario

Please find attached the Durham Community Legal Clinic's ("DCLC") submissions with respect to the removal of juries from civil trials in Ontario. Our submissions are unique in that they highlight the importance of civil juries in the context of access to justice and community participation, with a particular interest to marginalized populations in Ontario.

Our position is that the Government of Ontario should not eliminate juries from civil trials. Eliminating juries will not reduce the current backlogs in the court system. Rather, the removal of civil juries will prevent individuals from having their case heard by their peers, and may further entrench the divide between marginalized and low-income individuals and members of the Bench.

If reforms are needed to the civil jury system, a better place to start iswith the deductible in personal injury cases. This is the only example in Ontario where civil juries are creating an unnecessary use of judicial resources. It is a problem that can be addressed without dispensing of the jury system itself.

Sincerely,

Omar Ha-Redeye
Executive Director

A Solution Without a Problem: The Question of Civil Juries in Ontario

By Omar Ha-Redeye, Executive Director, Durham Community Legal Clinic

Introduction

The COVID-19 pandemic has had an enormous impact on the justice system. The implementation of social isolation protocols as a public health measure have necessitated remote and video conferences for motions and mediations, but courts in Canada have yet to attempt a trial through remote technology. Even more challenging would be a jury trial, given that jury selection and the nature of jury deliberations themselves require a level of social interaction that would likely impact trial rights in a substantial manner. The Chief Medical Officer of Health of Newfoundland and Labrador has been in discussions with the Chief Justice of the Supreme Court of Newfoundland and Labrador about how to safely resume jury trials, but no solution has been proposed thus far.[1] Despite the lack of active jury trials, their use has come up during the pandemic in entirely different ways. The Attorney General in Ontario has indicated they are engaging in a consultation about whether to eliminate civil juries to address court backlogs[2]. This paper provides some background into the use of civil juries in Ontario, describes the mechanisms and oversight currently in place, and calls for retaining the use of juries in civil proceedings, as their use does not impact court backlogs in any significant manner.

The right to a jury trial is enshrined in Canadian constitutional law under section 11(f) of the *Charter of Rights and Freedoms*.[3] This constitutional right is limited however to criminal offences where the maximum punishment is five years imprisonment or more.[4] The use of juries

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[1] Tara Bradbury, "Juries still out in Newfoundland and Labrador in light of COVID-19", *The Telegram* (24 May 2020), online: <www.thetelegram.com/news/local/juries-still-out-in-newfoundland-and-labrador-in-light-of-covid-19-453376/>

[2] David Kitai, "Ontario Attorney General seeks input on removing juries from civil trials", *Canadian Lawyer* (9 June 2020), online: <www.canadianlawyermag.com/practice-areas/litigation/ontario-attorney-general-seeks-input-on-removing-juries-from-civil-trials/330370>

[3] Canadian Charter of Rights and Freedoms, s 11(f), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982(UK), 1982, c 11.

[4] Some dispute whether the constitutionality of jury trials are limited to criminal actions, and argue that it extends to civil trials as well; Joseph J. Colangelo, "Challenges of a Civil Jury Trial" in *Annual Review of Civil Litigation*, Mr. Justice Todd L. Archibald, ed, (Toronto: Carswell 2019). However, this is outside the scope of this paper, and will not be explored here. [*Archibald*]

in civil litigation is far rarer in Canada, and there are even some types of civil actions where it is explicitly prohibited in Ontario by the *Courts of Justice Act* to proceed with a jury.[5] Jury trials are rarer still in complex civil actions. Parties may obtain a civil trial in Ontario by serving a jury notice pursuant to Rule 47.01 of the *Rules of Civil Procedure*, but section 108(3) of the *CJA* empowers courts to strike out a jury notice, and given the complexity of the evidence typically offered in certain types of jury trials, juries are often struck on that basis. Although the constitutionality of striking civil juries on the basis of complexity has come under scrutiny in Ontario in recent years. It has been upheld as constitutional and not violating s. 7 and 15 of the *Charter*.[6]

At the same time, the sophistication of the Canadian public has changed considerably in recent years, especially in their education and awareness of scientific knowledge, health and medical issues. High-profile news cases and public discourse, such as around the COVID-19 pandemic, ensure that members of the public today have a far better basic knowledge of topical scientific issues. Courts in Ontario have already been shifting over time from a judicial rule of routinely striking juries in complex civil actions, to increasingly allowing them, with scrutiny of any relevant factors. If these factors are applied with the knowledge that people in Ontario are better equipped to deal with expert medical evidence, these juries should not be struck as frequently. Consequently, the future of complex civil trials in Ontario should properly include the possibility of a trial before a judge and a jury. Removing this feature from the civil justice system is not necessary, and creates less flexibility in how matters are adjudicated. It risks removing some of the nuance and specialized insight that community members can provide the court in respect to community standards. And finally, the historical background of juries, even in the civil context, demonstrates that they serve an important counterbalance in a democracy against political abuses by the legislature or executive.

[5] *Courts of Justice Act*, RSO 1990, C 43, s 108(2) [*CJA*]. The types of actions prohibited from a jury include ones that involve: an injunction or mandatory order; partition or sale of real property; family law proceedings; dissolution of a partnership or taking of partnership or other accounts; foreclosure or redemption of a mortgage; sale and distribution of the proceeds of property subject to any lien or charge; execution of a trust; rectification, setting aside or cancellation of a deed or other written instrument; specific performance of a contract; declaratory or other equitable relief; relief against a municipality; and, simplified procedures.
[6] *Legroulx v Pitre*, 2009 ONCA 760, leave to appeal to SCC refused, 407 NR 386 (note) [*Legroulx*].

The Role of the Civil Jury

The origin of the jury system in the common law appears to be found in medieval Normandy, and was brought to England by the Normans in the 11th century.[7] In its infancy, the jury appeared to be 12 men, often knights, gathered from a community to provide testimony or make a determination of facts. The jury eventually became a safeguard against abuses by the Crown, particularly against judges appointed by the sovereign.[8] In keeping with this anti-establishment origin, the right to a civil jury trial was expressly enshrined in the Seventh Amendment of the American constitution.[9] Although no comparable constitutional origin for the civil jury can be found in Ontario, it does date back even before confederation to at least 1792 in the *Act to Establish Trials by Jury*,[10] at which time juries were mandatory in civil trials. However, concerns surrounding the idea that the government and the affluent packed these jury panels with people favourable to their cause, led to significant reforms in jury selection in 1850.[11] By 1856, parties to a civil trial could proceed without a jury on consent, and by 1868 civil trials were presumptively held with a judge alone unless a party requested a jury.[12]

The current provisions under the *CJA* have been in place in Ontario since 1990, and it does not seem apparent that the jury fulfills all of the roles that its earlier iterations played in the common law. However, a review of the civil jury system in 1996 by the Ontario Law Reform Commission identified several justifications for retaining it. In addition to the broader goals of public participation and promotion of civic duty, civil juries appear to act as a catalyst for

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[7] Todd L Archibald & Robert L Gain, "The Breadth of Civil Jury Trials in Canada: Their History and Availability" in Justice Todd L. Archibald & The Honourable Mr. Justice Randall Scott Echlin, eds, *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2007),
Ch E at 2. See also, John A Makdisi, "The Islamic Origins of the Common Law" (1999 June) 77:5 NCL Rev at 1635-1739 for an interesting treatise on an Arab/Berber-Sicilian origin via the Normans.

[8] This was particularly true given the lack of judicial independence prior to the Revolution of 1688.

[9] The American constitutional basis for civil juries has even been used to reject the proposal of specific health courts, on the basis that it would violate this constitutional right. See Maxwell J Mehlman & Dale A Nance, "The Case Against "Health Courts"" (2007 April), online (pdf): *American Association for Justice* <www.justice.org/cps/rde/xbcr/justice/The_Case_Against_Health_Courts_1.pdf>

[10] 32 Geo 3, c 2 (Upper Can), as cited in Ontario Law Reform Commission, "Report on the use of jury trials in civil cases" (1996) at 5-6, online: *Internet Archive* <archive.org/details/reportonuseofju00onta> [OLRC]
For a summary of the report's findings, see W A Bogart, "Guardian of Civil Rights… Medieval Relic: The Civil Jury in Canada" (1999) 62:2 *Law and Contemporary Problems*. [*Bogart*]

[11] OLRC, *ibid; An Act for the Consolidation and Amendment of the Laws Relative to Jurors, Juries and Inquests in that Part of this Province called Upper Canada*, 1850, 13 & 14 Vict, c 55 (Prov of Can). See also R Blake Brown, "Challenges for Cause, Stand-Asides, and Peremptory Challenges in the Nineteenth Century" (2000) 38:3 OHLJ 453 at 492.

[12] OLRC, *ibid; The Law Reform Act of 1868*, 32 Vict, c 6 (Ont) at s 18(1).

settlement.[13] The Commission found that jury cases are more likely to settle before trial, and jury cases that reach trial also settle earlier than trials with only judges. These likelihoods offset one of the major shortcomings noted by the Commission, the increased costs of holding a jury trial.[14] The Commission also found that juries are just as competent as a judge, especially for findings of credibility and assessing damages. Even when juries are used for strategic or tactical purposes, this finding of competency would limit any abuse in the use of juries in the civil justice system.[15]

Despite these advantages, the use of civil juries in Ontario has been historically low, and outside of Ontario it has been even lower still. A 1975 report by the Manitoba Law Reform Commission disclosed there were absolutely no civil jury trials in the province from 1957 to 1975, and the numbers in Alberta and Saskatchewan were negligible.[16] As it currently stands, civil juries only appear to be used in Ontario and British Columbia. Although the use of civil juries is sporadically permitted in other provinces, there is a general assumption that complex civil trials are inappropriate for juries. Many assumptions about juries are still changing across Canada and are slowly being reflected in legislation, even if trial level courts continue to lag behind.[17] The right to choose a civil jury is largely codified by statute across Canada, with the exception of Quebec and with some limitations in British Columbia and Alberta. In some jurisdictions there are explicit causes of actions where juries are permitted, whereas other jurisdictions list causes of actions where juries are prohibited.[18] A blanket approach that removes juries entirely from the civil justice system is unwarranted, overreaching, and likely to have unintended consequences.

[13] OLRC, *ibid* at 34, 54-55. The Commission heard from lawyers and judges who suggested this settlement function was due to the jury's perceived unpredictability.
[14] *Ibid* at 26-27. See also Bogart, *supra* note 9 at 316.
[15] *Ibid* at 23-24. Numerous American studies have also demonstrated the efficacy of civil juries and have addressed many of the fallacies of expressed concerns. See Neil Vidmar, "Juries and Medical Malpractice Claims: Empirical Facts versus Myths" (2009) 467:2 *Clin Orthop Relat Res* at 367–375; Jennifer K Robbennolt, "Evaluating Juries by Comparison to Judges: A Benchmark for Judging?" (2005) 32:2 Fla St U L Rev 469; Eric Helland & Alexander Tabarrok, "Runaway Judges? Selection Effects and the Jury" (2000) 16:2 JLEO 306 at 333.
[16] *Ibid* at 16.
[17] Ellen I Picard & Gerald B Robertson, *Legal Liability of Doctors and Hospitals in Canada*, (Toronto: Thomson Carswell, 2007) at 410-411.
[18] Archibald, *supra* note 4 at 5.

The Transforming Landscape of Judicial Discretion in Ontario

In Ontario it used to be routine to strike juries in complex civil actions.[19] This judicially created rule stemmed from two key cases in the early 20th century, *Town v. Archer*[20] and *Gerbracht v. Bingham*.[21] In *Archer*, Chief Justice Falconbridge stated at p. 389 that medical malpractice claims were almost always tried in England and Canada by a jury.[22] However, he cited several cases from the 19th century indicating how this practice was fraught with risk.[23] In particular, he expressed concern that physicians should not be held at the mercy of jury members who may have to deal with difficult scientific questions, and he assumed that juries would invariably favour plaintiffs. Cases around the turn of the century then began to suggest that complex scientific questions in medical malpractice cases should not be put to a jury but that questions of fact are suitable for determinations by a jury[24] Falconbridge, C.J. indicated that the case before him was tried with a jury; however, following the reasoning in *Kempffer v Conerty*, he allowed the appeal and ordered a new trial because questions of fact were not properly put to the jury.[25] However, he also indicated that this principal was never intended to hamper judicial discretion over the issue. Similarly, in *Bingham*, Justice Ridell stated that medical malpractice cases were too complex for juries. He noted that the state of the law in Ontario at the time was that there had not been a medical malpractice trial with a jury for decades. The combination of these two cases created a judicial rule which would govern Ontario for many years to come.

Other provinces did not necessarily follow the rule in *Archer* and *Bingham*. In *Kingsbury v. Washington*,[26] the Manitoba Court of Appeal considered an application by a plaintiff in a medical malpractice action for a trial with a jury which was dismissed on the basis of the Ontario line of cases. This chambers decision was reversed based on the statutory differences in the province, which requires a plaintiff to satisfy the Court that a case should be tried with a jury as opposed to serving a notice. The split appellate court ended up dismissing the appeal and rejecting the Ontario line of authorities.[27] Trueman, J.A. considered the cases referred to by

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[19] Garry D Watson, *Holmested & Watson, Ontario Civil Procedure,* (Canada: Thomson Reuters Canada Limited) at R 47§15 [*Holmested & Watson*].
[20] 1902 CarswellOnt 299, 4 OLR 383 (HC) [*Archer*].
[21] 1912 CarswellOnt 494, 4 OWN 117 (HC) [*Gerbracht*].
[22] See also *Hodgins v Banting*, [1906] OJ No 29, 7 OWR 707 at para 2; *Abel v Cooke*, [1938] 1 WWR 49, [1938] 1 DLR 170.
[23] *Jackson v Hyde*, 1869 CarswellOnt 194, 28 UCQB 294; *Fields v Rutherford*, 1878 CarswellOnt 119, 29 UCCP 113; *McQuay v Eastwood*, 1886WL13499, 12 OR 402.
[24] *Kempffer v Conerty*, 1988WL10785, 2 OLR 658 (note); *McNulty v Morris*, 1901WL10710, 2 OLR 656.
[25] *McNulty v Morris*, 1901WL10710, 2 OLR 656 (CA).
[26] [1925] 3 WWR 436, 35 Man R 246.
[27] The basis for doing so in Ontario was the *Judicature Act*, RSO, 1914, c 56 at s 56 (3).

Falconbridge, C.J. in *Archer* and the subsequent developments in Ontario, and found that the inflexible Ontario approach was inappropriate for Manitoba given the respective jury provisions in that province.[28] At para. 54, Justice Trueman referred to a significant history of success by the London Medical Defence Union which would suggest the concerns of juries being unfair to doctors were unfounded.[29] In 1967, the Ontario Court of Appeal described the civil jury as a "vested statutory right," emphasizing that striking a jury is based on judicial discretion and should not be interfered with unless it is clearly wrong or will result in a denial of justice.[30]

Ontario courts began to re-examine the issue in 1976 in *Law v. Woolford*,[31] where Justice Osler allowed a jury to rule on damages.[32] Although he was not required to rule on jury deliberations on liability, Justice Osler did comment in *obiter* at para. 2 on the assumption that such issues were too complex for a jury, stating, "In these days of much greater sophistication among jurymen I am not sure that such reasons are any longer valid." A more complicated situation arises when the facts and liability are intricately intertwined as emerged in the subsequent case of *Soldwisch v.Toronto Western Hospital*,[33] where the plaintiff believed he was not fettered by any such automatic judicial rule.[34] Justice Montgomery of the Ontario Supreme Court allowed the appeal of the notice dismissal, listing the following factors:

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[28] *The King's Bench Act*, RSM 1913, c 46.

[29] "…It is also clear that medical practitioners in England have no reason not to have confidence in trial by jury. *Taylor's Medical Jurisprudence* , (ed. 1920), p. 88, refers to 140 cases tried by jury and contested by the London Medical Defence Union in 1901. In each case it was successful. Twenty-six of the cases were for malpractice."

[30] *Majcenic v Natale,* [1967] OJ No 1111 at para 38, 66 DLR (2d) 50 (CA). This approach was explicitly rejected by Justice Barr in *Strojny v Chan*, [1988] OJ No 201 at para 17, 26 CPC (2d) 38 (HCJ) [*Strojny*],

> With respect, I think that this argument is unsound. The answer to every one of these questions is that the Judge is better. He has superior education, is familiar with anatomy and medical terms, he takes notes, he is trained in analyzing and weighing expert evidence. In fact, if the approach urged by Mr. Milligan is right, there will never be a case which ought to be tried by a jury.

[31] 1976 CarswellOnt 344, 2 CPC 197 (HC) [*Woolford*].

[32] Holmested & Watson, *supra* note 19 at p 2.

[33] 1982 CarswellOnt 512, 39 OR (2d) 705 (HCJ) [*Soldwisch*]. Other Ontario cases questioned this rule before *Soldwisch*, for example *Lalonde v Sudbury General Hospital of the Immaculate Heart of Mary* 1980 CarswellOnt 446, 19 CPC 147 (Ont Dist Ct), which was settled before the issue could be decided. See D Jack, "Jury Notices in Medical Malpractice Cases: Judicial Reconsideration of Older Authorities" (1977-78) 1:387 Advoc Q at 124-125 [*Jack*].

[34] Other courts have determined that liability was more appropriate determined by judge and jury, and damages should be determined by judge alone, i.e. *Lord v Royal Columbian Hospital* [1980] BCJ No 809, 27 BCLR 123 (BC CA). See Jack, *ibid* at 128. See also *contra* in *Crane v Canadian National Railway Company,* 2007 Carswell Ont 5736, 86 OR (3d) 749 at para 8, citing s 108 of the *Courts of Justice Act*, RSO 1990, c 43 to support the proposition that the proper jurisdiction of the jury is for questions of fact.

- The Supreme Court of Canada had the opportunity in *Vancouver General Hospital v. Fraser*[35] and *Eady v. Tenderenda*[36] to make policy statements on medical malpractice juries, but chose not to do so (para. 7)
- Chief Justice Falconbridge's comments in *Archer* were obiter, as were comments in subsequent cases relying on *Archer* (paras. 8-9)
- The medical profession should not have the privilege of being insulated from a jury trial absent a clear statutory basis for doing so (para. 10)
- Chief Justice Falconbridge's decision was made at a time when motion court judges decisions were not final (para. 11)
- There was no appellate decision in Ontario directly dealing with jury notices in medical malpractice actions (para. 13)

Justice Montgomery expanded on this last point at para. 14, and stated that an appellate decision on this issue would be helpful. This assistance came from the Divisional Court the following year in the same case.[37] The unanimous Divisional Court opinion emphasized the substantive right of a jury, while recognizing this right is not absolute. The application of judicial discretion was not optional but mandatory, but at para. 23 the court emphasized it is far more efficient to explain complicated and technical concepts to a single judge than it is to ensure that an entire jury understands these ideas. The test established by the Divisional Court was as follows:

> …will justice to the litigants in this case be better served by retention or discharge of the jury? We think that an important element in any answer to that question is which forum is more likely going to be able to comprehend, recollect, analyze and eventually weigh expert testimony on complex and highly technical scientific matters. It is essential to just determination of issues that the tribunal of fact be able to understand the case that the litigants are putting forward.[38]

The implication of *Soldwisch* is that pleadings alone are not sufficient to strike a jury notice, and any application to strike a jury must be substantiated with sufficient materials demonstrating sufficient complexity.[39] A trial judge must still exert their discretion in determining whether a

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[35] [1952] 2 SCR 36, [1952] 3 DLR 785.
[36] [1975] 2 SCR 599, 3 NR 26.
[37] 1984 CarswellOnt 523, 43 OR (2d) 449 (Div Ct).
[38] See also *Ralph v Robertson*, [1995] AJ No 746 (Alta QB) at para 6.
[39] Jack, *supra* note 32 at 126. An additional test to determine whether or not it is convenient has been enunciated in *Nagy v Phillips*, 2002 ABQB 155 at para 8 as follows:

a) whether the jury will have to spend an undue amount of time examining exhibits,
b) the length and complexity of the potential scientific examination rather than convenience for the individual juror,
c) the ability of the jury to understand the nature of the issues,
d) the interplay of facts and various legal tests that must be applied to those facts,
e) conflicting medical evidence,
f) the laboriousness and difficulty in recording, remembering, comprehending and collating evidence, and,
g) whether justice to both parties is better served with or without a jury.

case should be tried with a jury,[40] meaning the complexity of the proceedings, and the ability of the jury to deal with it, is something which must continually be addressed in every proceeding.

Why Juries are Properly Struck in Complex Civil Actions

The importance of a jury, even in the civil context, has been repeatedly been emphasized by the Supreme Court of Canada. Justice Cartwright stated at para. 17 in *King v. Colonial Homes Ltd.*,[41] "…the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons."[42] However, in the same paragraph he rejected the notion that a new trial should be ordered by an appellate court for dismissing a jury, as long as the court was satisfied that the jury would have come to the same result as the trial judge. Justice Lacourcière of the Ontario Court of Appeal stated this discretion would only be improperly exercised if it were conducted "in an arbitrary or capricious manner, or in reliance on a wrong or inapplicable principle of law."[43] A motion judge hearing a motion to strike a jury notice in a complex civil action should exercise discretion to determine what is fair and equitable, in the specific case before the court.[44] Specifically, a judge should turn his or her mind to whether justice for the litigants is better served by the retention or discharge of the jury.[45] It is this judicial supervision of the ability to have a civil jury that affords the justice system adequate flexibility, and militates against legislative reform that would prohibit a civil jury outright.

What are the principles of law, and determination of fairness and equity that judges should be relying upon? The *Rules of Civil Procedure* in Ontario and the *CJA* provide very little guidance with how judicial discretion should be exercised in striking a jury.[46] Determining the level of complexity is itself a complex exercise, with very little in the way of objective standards. . Justice Barr stated in *Strojny et al. v. Chan et al.*, "The answer to every one of these questions is

[40] *Etienne v McKellar General Hospital*, [1998] OJ No 624, 16 CPC (3d) 139 (CA); leave to appeal refused (1998), 234 NR 199 (note) (SCC); reconsideration refused, 2000 CarswellOnt 5790 (SCC).
[41] [1956] SCR 528, 4 DLR (2d) 561.
[42] See also *Cameron v Service*, [1993] BCWLD 1027, 77 BCLR (2d) 317 (SC); *Bhullar v Atwal* (1995), 15 BCLR (3d) 198, 43 CPC (3d) 326. British Columbia, which does not have the same statutory basis for civil jury trials, has debated whether this right is procedural or substantive. These cases concluded that it is the latter despite not being enshrined constitutionally, and is grounded in the common law.
[43] *Aitken v Forsell*, [1991] OJ No 912, 50 CPC (2d) 176 (ONCA) at para 7. See also *Gorman v Falardeau*, 197 OAC 316 (ONCA) at para 34.
[44] *Martin v Deutch*, [1943] OR 683 at 698, [1943] 4 DLR 600 (CA).
[45] *Ibid* at 201-202.
[46] See *Cowles v Balac* (2006), 83 OR (3d) 660 at para 35, 273 DLR (4th) 596 (CA); leave to appeal refused, 367 NR 400 (note) [*Cowles*]. See also Archibald, *supra* note 4 at 8.

that the judge is better..."[47] Justice Rooke of the Alberta Court of Queen's Bench has listed the following factors based on case law in that jurisdiction: the number of issues; the number of experts; the need for an interpreter; the legal issues to be put to the jury; conflicts of expert opinions; causation; and any other factors.[48] The presence of any one of these does not necessarily make a trial too complicated for a jury – it is typically a combination of these factors added together which can complicate the matter.[49] If legislative reform were to be introduced for civil trials, it would be better to codify these principles in law, rather than resorting to a complete excision of their use.

Of particular concern in complex civil trials are expert reports, which can be particularly detailed, lengthy, and contradictory in nature when looking at the reports from each party. Courts have dealt with these concerns by having reports properly explained by counsel, and through the live evidence of the experts themselves.[50] Complexity of expert reports can be reduced if they are presented in a readable and straightforward manner, and counsel can instruct their experts to do so well in advance of a trial.[51] The degree of complexity of the expert reports is not just limited to the contents of the reports, but also the complexities in applying the medical evidence to the facts and issues before the court.[52] Justice McDermid attempted to reconcile the statement by Justice Barr in *Strojny* with the principles in *Soldwisch* by conceding that most medical malpractice actions require some medical education of the jury. A jury should only be struck when "the facts, the law or both are such that a jury cannot reasonably be expected to be able to follow the evidence properly or to apply the judge's charge properly," and this analysis should occur in every case before the court.[53]

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[47] 6 CPC (2d) 38 at 41, [1988] OJ No 201 (HC) [*Strojny*]. However, see the comments of Justice Power of the trial decision in *Legroulx*, *supra* note 6 at para 78,

> "…Judges do not "deem" themselves better qualified than lay citizens acting as triers of fact. As observed above, judges, on a daily basis, are required to deal with difficult legal and factual issues and possess learning and expertise in doing so, learning and expertise that is not possessed by the ordinary juror."

[48] *Shaw v Standard Life Assurance Co*, 2006 ABQB 156 at para 29 [*Shaw*].

[49] *Ibid* at para 30. See also *Clark v McLauchlan*, [2002] OJ No 1968, 2002 CarswellOnt 1610 at para 29 for an Ontario authority of the same.

[50] *Fowler v Dion,* 2009 ABQB 734 at para 12.

[51] *Shaw*, *supra* note 47 at para 21.

[52] *Leadbetter v Brand*, (1979), 37 NSR (2d) (NSSC) at para 8; *MacIntyre v Nova Scotia Power Corp* (1995), 145 NSR (2d) 209 at paras 13-14, 39 CPC (3d) 221 (SC). See also Archibald, *supra* note 4 at 9-10.

[53] *Campbell v Sinal*, 35 CPC (2d) 283 at 290, [1989] OJ No 566 (HC). This principle has been reiterated by the Ontario Court of Appeal in *Hunt (Litigation Guardian of) v Sutton Group Incentive Realty Inc* (2002), 60 OR (3d) 665 at 678, 162 OAC 186 (*Hunt*), where the court also stated at para 70 that it is an error in law to discharge a jury based on an inability to explain the applicable law to it. The court also stated at para 62 that an issue of mixed fact and law is not necessarily complex by itself. See also *Georgia Gulf Corp v Window City Industries Inc*, 2004 CarswellOnt 1780 at paras 7-9, [2004] OJ No 1855 (SC).

Public Familiarity with Medical Issues

Complexity is a highly subjective notion, will vary across geographic jurisdictions, and will change over time. Judges may find that in their particular jurisdiction, where the jury pool exhibits particular sophistication, that concerns over complexity are not as warranted as they are elsewhere. The Canadian public is also far better informed on scientific and medical issues than they were at the time of *Woolford* in 1976, and are even more sophisticated than the time of *Archer* in 1902. In 1966 the British Columbia Court of Appeal discussed the former Ontario rule in *McDonald v. Inland Natural Gas Co.*[54] Branca J.A. stated at para. 42 that the exercise of judicial discretion in striking medical malpractice jury notices should "…be adapted to meet the changing circumstances and the complexities of modern life…"

Health and scientific issues are common in mass media today, and the Canadian public is far more informed on their basic principles than they were in the past. A big part of this change is the aging of the baby boomer population, and as this large demographic encounters their own health issues they develop a huge appetite for health education.[55] Surveys consistently show that health care issues are a top priority for Canadians,[56] and health expenditures compose a significant portion of the budget of the Ontario budget. Meeting the growing health budget while facing fiscal contractions is a major political priority and an issue of public interest.[57] Television, newspapers, radio and websites have all complied with this demand for health information, providing the public with conflicting and competing views on health and medical issues, and allowing people to educate themselves independently of their physicians. The COVID-19 pandemic demonstrated this quite clearly, with nearly every Canadian taking some interest in learning about epidemiology, virology, public health, and other areas of science. Not all of this information is accurate though, which has bred a healthy dose of scepticism among the public as well. Dr. William Miser states in "Finding Truth from the Medical Literature: How to Critically Evaluate an Article,"[58]

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[54] [1996] BCJ No 40, 57 WWR 87 (CA).
[55] See, for example, Healthy Aging and Wellness Working Group, "Healthy Aging in Canada: A New Vision, A Vital Investment from Evidence to Action" (September 2006), online (pdf): *Federal/Provincial/Territorial (F/P/T) Committee of Officials (Seniors)* <www.health.gov.nl.ca/health/publications/vision_rpt_e.pdf>.
[56] See for example, "Health care of top importance to Canadians", *CTV News* (25 July 2013), online: <www.ctvnews.ca/politics/health-care-of-top-importance-to-canadians-1.892638>.
[57] See Ministry of Health and Long-Term Care, "Ontario's Action Plan For Health Care" (2012), online (pdf): *Ontario* <www.health.gov.on.ca/en/ms/ecfa/healthy_change/docs/rep_healthychange.pdf>.
[58] William F Miser, "Finding Truth from the Medical Literature: How to Critically Evaluate an Article" (2006) 33:4 *Primary Care: Clinics in Office Practice* at 839.

> "Gone are the days when what the physician says goes unchallenged by a patient… Patients are searching for answers even before they come to the office, and are bringing with them articles they have downloaded from the Internet for interpretation."

The role of physicians has transformed more towards developing the ability to critically assess original research than simply providing information. The implications of this are two-fold. First, the public is accustomed to dealing with complex and sophisticated medical arguments, often of a conflicting nature. Second, they are accustomed to testing this information with the use of medical experts, often several experts when they are shopping around for second or third opinions. Consequently, the sophistication of the jury pool, and their ability to process and comprehend complex scientific information as provided by expert witnesses and apply it to the facts of a case should not be issues of significant concern as they have been in the past.

The Use of Novel Science

In spite of the expansive coverage in the media provided to medical developments, the growth of medical knowledge has exploded in recent decades to the extent that it is now[59] impossible for a jury pool to know about every possible development and ground-breaking research, Therefore, there is a danger that the presentation of cutting edge information in a complex civil trial will present a mystique which will improperly influence the jury.[60] Similar concerns have been raised in the criminal context with what has been referred to as the "CSI effect." Given the proliferation of crime-dramas on television, some investigators expect that juries will have a heightened expectation of what evidence a prosecution will need to properly convict someone.[61] However, this notion has been challenged by several quarters, who claim that despite the popularity of crime dramas, juries do not actually make their decisions differently at

[59] The concern over an abundance of medical information, even for physicians, is not a new one. See Samuel Arbesman, "Coping with Changing Medical Knowledge" (8 May 2013), online: *Wired* <www.wired.com/wiredscience/2013/05/coping-with-changing-medical-knowledge/>.
[60] New science may make a civil jury inappropriate. See for example fibroyalgia in *Seifried v Range*, [1997] AJ No 326, 199 AR 79 (QB); reflex sympathetic dystrophy syndrome in *Wiredu-Danquah v Leck*, 1999 ABQB 952.
[61] This suggestion first emerged from Kit R Roane, "The CSI Effect", *U.S. News and World Report* (17 April 2005), online: <www.usnews.com/usnews/culture/articles/050425/25csi.htm>. It has subsequently been the subject of inquiry by a number of others. See Kimberlianne Podlas, "The Potential Impact of Television on Jurors" (2010 August), online (pdf): *Impression and Pattern Evidence Symposium* <projects.nfstc.org/ipes/presentations/Podlas_tv-jurors.pdf>. See also Maricopa County Attorney's Office, "The CSI Effect and its Real-Life Impact on Justice" (30 June 2005), online (pdf): <www.ce9.uscourts.gov/jc2008/references/csi/CSI_Effect_report.pdf>

trial as a result.[62] Judge Shelton of Ann Arbour, Michigan found that these programs are part of a larger media milieu, and do not play any clear role in forging jury expectations.[63] Shelton at al. have also indicated that "Expectations are one thing, but demands are another."[64] Juror expectations are the result of many influences in our mass media age, but jurors do not appear to *require* this type of evidence to come to a finding of guilt.

The similar analogy made in medical malpractice is that despite the proliferation of medical and hospital dramas the jury will not necessarily require cutting edge and impressive medical evidence at trial. The concern about scientific information providing a mystique to the jury has been dealt with by the courts in several ways. Justice Sopinka highlighted in the Supreme Court of Canada decision of *R v. Mohan* the importance of special scrutiny of novel evidence to see if it meets a basic threshold of reliability.[65] From *Mohan* we also get the principles that novel evidence must be relevant, and must be necessary in assisting the trier of fact.[66] Judges still act as gatekeepers for novel science before a jury, and if the trier of fact can still come to the necessary conclusions without the medical evidence, the expert witness can be properly excluded.[67]

Canadian courts also use a test obtained from an American case, *Daubert v. Merrell Dow Pharmaceuticals Inc.*[68] The *Daubert* criteria look at whether the theory or technique can and has been tested; whether it has been subjected to peer review or publication; the rate of error or existence of standards; and whether the theory or technique has been generally accepted in the scientific community. These criteria are also analyzed by the judge as part of the role of gatekeeper, and ensure that any novel scientific evidence that does go before the jury is reliable.[69] The risk of mystique, and the apparent concern over complexity arising specifically

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[62]Tom R Tyler argues in "Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction" (2006) 115:1050 Yale L J, online: (pdf) <www.yalelawjournal.org/pdf/115-5/Tyler.pdf> that alternative explanations exist, and the CSI Effect may even have the opposite effect as intended

[63] Donald E Shelton, "Juror Expectations for Scientific Evidence in Criminal Cases: Perceptions and Reality about the "CSI Effect" Myth" (2010) 27:1 Thomas M Cooley Law Review, online (pdf): <www.npr.org/documents/2011/feb/shelton-CSI-study.pdf>

[64] Donald E Shelton, Gregg Barak & Young S Kim, "Studying Juror Expectations for Scientific Evidence: A New Model for Looking at the CSI Myth" (2011) 47:1-2,8-18 Court Review: Journal of the American Judges Association Paper No 354, online: <digitalcommons.unl.edu/ajacourtreview/354>

[65] [1994] 2 SCR 9, 114 DLR (4th) 419 [*Mohan*].

[66] As well as the absence of any exclusionary rule and is by a qualified expert. See for example, *R v J-LJ*, [2000] 2 SCR 600, 192 DLR (4th) 416 [*LJL*].

[67] *Resurfice Corp v Hanke*, [2007] 1 SCR 333 at para 9, 278 DLR (4th) 643.

[68] (1993), 509 US 579, 113 S Ct 2786 [*Daubert*].

[69] Brenda J Johnson and John G Martland propose in "Selected Issues in Medical Malpractice" (Special Edition, 2003) Health L J at 250-252 a composite test from *Mohan*, *Daubert*, and *LJL*, as follows: 1. Necessity, 2. Qualified

due to the innovative nature of expert medical information, is therefore minimized in complex civil trials.

Conclusions

Although we do periodically hear calls for more civil jury trials in Canada, these calls are still few and far in between.[70] For the most part, they remain a scarcely-used and obscure mechanism for dispute resolution, with the vast majority of civil disputes concluding well before the trial stage. The exclusion of juries from civil proceedings will therefore not have any significant impact on freeing up court time and resources, or assist in any meaningful way in addressing backlogs. More importantly, jury exclusion risks removing a classic hallmark of the justice system that has historically served the important purpose of instilling community-based perspectives into proceedings that are independent of governmental or political influence.[71]

The significance of community-based perspective is underscored by the Supreme Court of Canada *in Hill v. Church of Scientology* [72]:

> "When properly instructed, jurors are uniquely qualified to assess the damages suffered by the plaintiff. An appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure. General damages in defamation cases are presumed from the very publication of the false statement and are awarded at large. It is members of the community in which the defamed person lives who will be best able to assess the damages. The jury as representative of that community should be free to make an assessment of damages which will provide the plaintiff with a sum of money that clearly demonstrates to the community the vindication of the plaintiff's reputation.

Expert, 3. Relevancy, 4. Reliability (Applied to Novel Scientific Evidence), 5. Foundational Facts, 6. Absence of Exclusionary Rule, 7. Unfair Prejudice, and 8. Ultimate Issue.

[70] See, for example, Bert Raphael, "A Call for More Civil Jury Trials" (August 1988) 7:4 Advocates' Society Journal at 27- 28.

[71] See for example defamation: Law Commission of Ontario, "Defamation Law in Internet Age" (November 2017) online (pdf): *Law Commission of Ontario* <collections.ola.org/mon/31011/342883.pdf> at 83-84 ; *Hill v Church of Scientology,* [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129. In *Strojny*, *supra* note 46, Justice Barr stated at para 18, "Trial by jury has survived in spite of being inferior to trial by Judge in all aspects raised in the quotation from the Soldwisch judgment. This is not the place to explore the virtues of trial by jury but, in spite of its shortcomings, there are many who feel that the jury is a better tribunal for determining credibility and for finding facts generally and that jurors are more closely in touch with community standards and better able to apply them where they are relevant" [emphasis added].

[72] *Ibid.*

In *Trial by Jury*, Lord Devlin pointedly emphasizes the importance of independence from political influence,[73]

> Judges are appointed by the executive and I do not know of any better way of appointing them. But our history has shown that the executive has found it much easier to find judges who will do what it wants than it has to find amenable juries.

Juries continue to serve utility in ensuring a measure of objectivity in legal proceedings based on community standards, a perspective that may not always be present on the bench given its relative isolation from the public at large and limited life experiences. This concern would be particularly acute for parties who come from marginalized communities or low-income populations, as these groups are typically not reflected on the bench.[74] Maintaining civil juries therefore ensures that the people still have some control over the justice system, which is supposed to belong to them and serve their needs. In an era of an access to justice crisis, these types of symbolic principles still serve important purposes such as maintaining the confidence of the public in the justice system.

Worth highlighting is that this particular issue is not one that has been identified or flagged as one of concern with any level of consensus in the Canadian legal community. Most of the concerns around these jury trials stem from American discourses over juries, which are themselves flawed and misleading. American-style civil jury trials are unlikely to ever enter Canada, given our structural differences.[75] Indeed we have not seen a sentinel case in Canada indicating or calling for a drastic shift or reform for civil juries, in the way we have in *Archer* or *Soldwisch*.[76] The use of juries in complex civil actions is still largely constrained to Ontario, and

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[73] Sir Patrick Devlin, Trial By Jury, The Hamlyn Lectures, 8th Series, 1956, The Carswell Company Ltd., at 159, online:<https://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/Trial_by_Jury.pdf>

[74] Valerie P Hans, "What's It Worth? Jury Damage Awards as Community Judgements 55: 3 (2014) William & mary Law Review 935 at 960.

[75] Matt Borsellino, "U.S.-style medical litigation rows unlikely here" (7 September 2004) 33: 62 *The Medical Post* 40.

[76] Justice Myers provided critique of civil juries in *Mandel v Fakhim*, 2016 ONSC 6538 at para 9, stating "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." However, this is more related to the function of the statutory deductible of $30,000 under s. 267.5(7) of the *Insurance Act*, RSO 1990, c I 8, which cannot be disclosed to a jury. This is a more reasonable focus for statutory reform than the elimination of civil juries entirely, either through modification of the threshold, or

even there used in a very limited fashion. In part, this limited use is informed by the type of proceedings in Canada's largest common law jurisdiction, and one where the vast majority of technological, scientific, medical proceedings occur. Despite these characteristics, judicial oversight and discretion has ensured that an abundance of civil jury trials has in fact not occurred in Ontario in recent years. The primary concerns for judges when exercising their judicial discretion over whether a trial proceeds with a jury should continue to be the complexity of the facts and the expert evidence presented. Given that civil jury trials are currently a substantive right, judges can better apply discretion in excluding unnecessary or extraneous expert evidence to simplify a trial rather than dispensing with a civil jury altogether. Where legislative reform may occur in this area is in amending the Rules of Civil procedure and CJA to codify the common law discretion of a judge to strike a jury. These recommendations were made over two decades ago in the last comprehensive study on juries.[77] The last comprehensive review of civil juries in 2007 recommended that they be retained, except in the instance of simplified proceedings.[78] This latter exclusion was adopted in late 2019.[79]

The Government of Ontario should not eliminate juries from civil trials. Eliminating juries will not reduce the current backlogs in the court system. Rather, the removal of civil juries will prevent individuals from having their case heard by their peers, and may further entrench the divide between marginalized and low-income individuals and members of the Bench. If reforms are needed to the civil jury system, a better place to start is the deductible in personal injury cases. This is the only example in Ontario where civil juries are creating an unnecessary use of judicial resources. It is a problem that can be addressed without dispensing of the jury system itself; a system that has been a hallmark of access to justice in the legal system spanning several centuries.

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exclusion of certain types of insurance claims from jury proceedings. R.W. Howard Lightle notes for this reason that the push for eliminating civil juries largely emanates from the plaintiffs' personal injury bar; RW Howard Lightle, "Why The Onslaught in Ontario on Jury Trials" (accessed in 15 June 2020) online (pdf): *CdLawyers* <www.cdlawyers.org/files/WHY%20THE%20ONSLAUGHT%20IN%20ONTARIO%20ON%20JURY%20TRIALS.pdf>.

[77] Ontario Law Reform Commission, "Report on the Use of Jury Trials in Civil Cases" (1996) at 94, online (pdf): *Collections Ontario Law Reform Commission* <collections.ola.org/mon/27010/191606.pdf>.

[78] Honourable Coulter A Osborne, QC, "Civil Justice Reform Project," Civil Juries (last modified: 29 October 2015) online: *Ministry of Attorney General* <www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/090_civil.php>

[79] *Rules of Civil Procedure*, O Reg 344/19.