STRIKING THE CIVIL TRIAL JURY IN ONTARIO

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Introduction

Civil jury trials are an ancient and substantive right in much of Canada and the United States. The current state of the common law in Ontario is that judges retain discretion to strike the jury if overriding justice requires it, or if the case is likely to be too complex for the jury to understand and adjudicate properly. In exercising this test a wait-and-see approach is often adopted by the courts. While there are reasonable arguments that judges should be able to strike juries in some situations where it would be unfair to hear the case with a jury, in no known case has a court struck a jury on the overriding justice arm of the test. This contradicts the reality that lawyers almost never bring motions to strike the jury because of complexity. Instead, they move to strike juries because they are concerned with ulterior tactical rationales which they believe would be unseemly to articulate in open court. This paper proposes that the overriding justice part of the test be strengthened so that lawyers may be free to argue the true reasons why they want to strike the jury. This would bring the legal test in line with reality.

A Short History of Jury Trials

Jury trials date back to ancient Athens where juries of 500 people would hear regular cases and juries of between 1001 and 1501 would hear capital cases. Some juries could be as little as 12 though, and Aeschylus in his final play of the Orestia trilogy describes a jury trial where Athena calls a jury of 12 to hear a case. Ancient Rome also saw jury trials with hundreds of jurors.[1]

Many authors trace modern English common law jury trials to the Norman Conquest of 1066, when William the Conqueror established the system of *inquisition*.[2] Under this system Englishmen were permitted to demand an inquest, and men with knowledge of the matter swore to tell the truth to a judge who questioned them.

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1. https://en.wikipedia.org/wiki/Jury_trial (last accessed December 22, 2015).
2. Jeremy Solomon, "The Civil Jury: A Comparative Study of the Selection of Jurors in Ontario and the United States" (paper presented to The Advocates' Society – Practical Strategies, January, 2002, unpublished).

Others trace the roots of the jury system to the Magna Carta in 1215, where the great barons forced King John to agree to the fundamentals of the jury system and representative government.[3] Article 39 of the Magna Carta states: "no freeman shall be seized or imprisoned or dispossessed . . . except by the judgment of his peers". Lord John Russell in his treatise *On The English Government* wrote:[4]

> It is to trial by jury . . . more than even by representation . . . that the people owe the share they have in the government of the country; it is to trial by jury, also, that the government mainly owes the attachment of the people to the laws; a consideration which ought to make our legislators very cautious how they take away this mode of trial by new, trifling, and vexatious enactments.

Modern jury trials, where jurors choose between competing versions of the facts and evidence proffered by advocates, dates back to about the 14th century.[5] However, until around 1670 juries were still largely under the direction of the judge and could be severely punished if they decided cases contrary to wishes of the presiding judge.

The practice of punishing juries that refused to confirm judges' decisions ended with *Bushel's Case*.[6] In that case, the jury refused to follow the judge's direction to enter a guilty verdict on a charge akin to wrongful assembly, and the judge imprisoned the jurors without food, water or heat. Bushel appealed the imprisonment, arguing *habeas corpus*, and the appellate court ruled that jurors could no longer be punished.

In 1792, the United States Constitution implemented very strong recognition of the right to jury trials. Article Three of the Constitution and the 6th Amendment confirmed the right to a jury trial for criminal charges where the penalty could be longer than six months' imprisonment.

The 7th Amendment stated: "In Suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the

3. Paul Jewell, "How I Persuade a Jury: Enhancing Your Family Law Damage Claims" (Summer 2002), *The Litigator*.
4. Russell, *On the English Government* (1823), p. 394, quoted by Forsythe, *History of Trial by Jury*, 2nd ed. (Lennox Hill Publishing Company, 1878), p. 358; and see Russell, *An Essay on the History of the English Government and Constitution* (new add London 1865; Kraus Reprint Co., New York, 1971).
5. Wikipedia, *supra*, footnote 1.
6. (1670), 89 E.R. 2, 124 E.R. 1006, 1 Freem. K.B. 1 (Eng. K.B.).

common law."[7] The 7th Amendment applies to the Federal courts, but most states have similar provisions in their state constitutions.

The same year the 7th Amendment and the Bill of Rights were passed in the United States (1792), Ontario (then Upper Canada), passed *An Act to Establish Trials by Jury*. Juries were required at that time as they were viewed as a symbol of democracy. The preamble to the Act stated: "Whereas the trial by jury has been long established and approved in our mother country, and is one of the chief benefits to be attained by a free constitution." Of course, Upper Canada did not have a free Constitution at that point in time and the reference must have been with respect to the American Constitution. (Recall that this is before the war of 1812.)[8]

Despite the rhetoric, juries did not actually enforce democratic values *per se*, as the composition of juries was controlled by the local sheriff who would hand pick jurors sympathetic to the ruling powers.[9]

In 1850, the 1792 *An Act to Establish Trials by Jury* was replaced with *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*. With this legislation came the end to most mandatory trials by jury.[10]

The modern law of civil jury trials in Ontario is governed by s. 108 of the *Courts of Justice Act*,[11] Rule 47 of the *Rules of Civil Procedure*[12] (a regulation under the *Courts of Justice Act*), and the *Juries Act*.[13]

Interestingly, while the civil jury trial system is very strong in the United States and greatly embraced by the populace there, civil jury trials have all but disappeared in England and the rest of the world. In England, civil juries hear only libel and slander, fraud, malicious prosecution, and false imprisonment cases — nothing else. Civil jury trials obviously do not occur in civil law systems, and even in most other common law jurisdictions their use has been greatly curtailed.

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7. An interesting side note is to consider the implication of the originalist doctrine to the 7th amendment, which would create jury trials for virtually every federal civil trial regardless of how small the claim is worth, despite the obvious intention of the framers to limit access to jury trials to those claims involving significant sums of money.
8. *Supra*, footnote 2.
9. *Ibid.*
10. *Ibid.*
11. R.S.O. 1990, c. C.43.
12. R.R.O. 1990, Reg. 194.
13. R.S.O. 1990, c. J.3.

In Canada, provincial jurisdictions all employ distinct regimes when it comes to trial by jury. Quebec, a civil law jurisdiction, does not have any civil jury trials. Ontario, British Columbia and Prince Edward Island all permit civil jury trials but have both statutory exclusions as to what can be tried by a jury and the overarching judicial discretion to strike a jury, which is the focus of this paper. The remaining provinces and territories provide no general right to trial by jury, but do allow it in some instances such as for defamation. There are also no federal civil jury trials.[14]

From the review above it can be seen that jury trials have traditionally been viewed as a cornerstone of democracy and a check on governmental power. America has fully embraced the jury system while England and most other countries seem to have reduced their dependence on it or eliminated it entirely. In Ontario, the jury system is alive and well, but anecdotally judges seem to be more and more willing to strike the jury and hear the case as a judge alone.

Constitutional Arguments

In Canada the right to a jury trial in criminal cases is protected by s. 11 of the *Canadian Charter of Rights and Freedoms*. In the United States the constitution protects the right to a jury trial in both criminal and civil cases as outlined above. However, in Canada there is no constitutional right to a jury trial in civil cases.

That has not stopped ambitious lawyers from arguing that the right to a civil jury trial should be found to be part of the unwritten constitution (Canada has both a written and unwritten constitution). In *Legroulx v. Pitre*,[15] the appellant argued that the judge's decision to strike the jury on the grounds of complexity was contrary to the Charter rights of the Constitution.

The Court of Appeal held that the discretionary test outlined above did not offend the s. 7 right to "life, liberty and security of the person" because civil damages are purely an economic interest which is not covered by that section. The court also held that there was no breach of equality of persons because there was no "group" that was being discriminated against by the test. All Canadians can sue, be sued, or sit on a jury (except those ineligible under the *Juries Act*,[16] which include certain professions, disabled individuals, and recent

14. Caroline C. Failes Perley-Robertson, "The Right to a Jury – Is It Absolute?" Ontario Trial Lawyers Association, Case Comment on *Legroulx v. Pitre et al*. (May 24, 2007), Ottawa, 02-CV-21659 (Ont. S.C.J.).
15. 2009 ONCA 760, 78 C.P.C. (6th) 219, 200 C.R.R. (2d) 254 (Ont. C.A.), leave to appeal refused (2010), 271 O.A.C. 397(note), 407 N.R. 386(note) (S.C.C.).
16. *Juries Act*, R.S.O. 1990 c. J.3, s. 3.

jurors). Finally, the court held that the "complexity" portion of the test was not void for vagueness as the statute, rules, and jurisprudence provide an intelligible standard.[17]

Although a constitutional right to a civil jury trial seems to be dead, an enterprising lawyer who wished to retry the argument may be well served by reviewing the 1792 statute *An Act to Establish Trials by Jury*. Given that the preamble states "Whereas the trial by jury has been long established and approved in our mother country, and is one of the chief benefits to be attained by a free constitution", it is possible that the ancient Act could be used to argue that civil jury trials were part of the constitution of Upper Canada prior to the 1867 *British North America Act* which created the Dominion of Canada.

Right and Privilege of Jurors

The right to trial by jury is not only a right enjoyed by the litigants but also a right and duty enjoyed by the citizens of Canada. The National Judicial Institute of Canada has published "Model Jury Instructions";[18] these are the instructions commonly read by judges of the Ontario Superior Court to the Canadian citizens who are selected for the jury pool. Canadian citizens who are selected for the jury pool are advised that acting as a juror is *the* most important role and duty a citizen can play in the administration of justice:

> All jurors selected, whether they end up deliberating or not, will have performed an essential role in the administration of justice.
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> Jury service is the most important role that citizens can play in the administration of justice in Canada, and it is the duty of citizens from time to time. Most people chosen as jurors find jury duty a valuable experience, one that gives them a chance to play a direct part in the administration of justice in their community.

The standard Ontario jury charge in a civil trial confirms that participating in a jury trial is one of the most important duties a Canadian citizen can undertake to ensure the administration of justice in Canada. When reading the charge the judge describes the joint experience of the six jurors as invaluable to the fact-finding process. The standard jury charges reads:[19]

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17. *Legroulx v. Pitre*, *supra*, footnote 15 at paras. 3-9 (Ont. C.A.). See also *supra* footnote 14.
18. National Judicial Institute, "Model Jury Instruction", Section 1.1 at p. 7 and 1.10 at p. 9, last accessed April 2, 2015, at https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/?langSwitch=en.
19. See for instance the standard jury charge delivered by Justice Shaugnessy at

> The Importance of the Jury
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> As jurors, you have a direct and deciding voice in the administration of justice. You are engaged in one of the most important duties that a Canadian citizen can be called upon to perform. Your experience, individually and collectively, is an invaluable means of ensuring the reliability of the fact-finding processes of this trial, and the integrity and maintenance of public confidence in our system.

Overview of Jury System in Ontario

In any civil trial with a jury in Canada there are two judges of the issues: the judge who decides questions of law, and the jury who decides questions of fact. In practical effect, the six-person jury in a civil trial is tasked only with deciding approximately five to ten specific factual questions concerning the case. These questions are almost always agreed upon by the lawyers but, where they disagree, a trial judge can fix the final form of the questions before they are submitted to the jury.[20] Only five of the six jurors need to agree to the answer to each specific question and the five out of six majority can be composed of different jurors for each specific question.[21]

This is true whether it is a two-week whiplash trial or a nine-week contractual dispute trial. The end result is that the jury is tasked with sitting through the entire trial listening to all the evidence and then deciding only a few key factual issues at the heart of the matter. Judges almost invariably provide their opinion of the factual matters, but jurors are duty bound to ignore the judge's opinion of the facts if they disagree with it. They must, however, follow the judge's direction on the law.[22]

Legal Test to Strike the Civil Jury in Ontario

Judges in Ontario recognize that the right to a jury trial is an ancient and substantive right possessed by litigants. Master Abrams and Prof. McGuinness have written a leading text,[23] in which they

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the trial of Allan Dunklin and Andre Belair, Court File DC12-00512-00, on December 12, 2012, at p. 6.

20. *Byers (Litigation Guardian of) v. Pentex Print Master Industries Inc.* (2005), 137 A.C.W.S. (3d) 1130, 2005 CarswellOnt 1006, [2005] O.J. No. 1020 (Ont. C.A.) at para. 5.
21. Jury Charge of Judge in *McAllan v. Carswell*, 2011 ONSC 86, 196 A.C.W.S. (3d) 1138, [2011] O.J. No. 111 (Ont. S.C.J.).
22. *Ibid.*
23. Linda S. Abrams and Kevin P. McGuinnes, *Canadian Civil Procedure Law*, 2nd ed. (Markham: LexisNexis, 2010) at p. 1137.

confirm that the right to civil jury trials are an ancient and important tradition:

> **14.59** By ancient tradition, common law trials have been tried jointly by judges who are trained and experienced lawyers, and by juries that consist of lay people. In a jury trial, the judge decides questions of law while the jury makes determinations of fact. In broad terms, this ancient tradition continues in Ontario today . . .
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> **14.66** Courts should not jump to the conclusion that the trial of an action will be particularly complex . . .
>
> > It is trite law that the right to a trial by jury is a substantive right of great importance of which a party ought not to be deprived except for very cogent reasons.

The right to a jury trial is set out in s. 108 of the *Courts of Justice Act* (with specific exclusions enumerated therein), while the right of a judge to strike a jury in a civil trial is governed under Rule 47 of the *Rules of Civil Procedure*, a regulation under the *Courts of Justice Act*. Rule 47.02(2) provides:

> A motion to strike out a jury notice on the ground that the action ought to be tried without a jury shall be made to a judge.

The courts of Ontario and the Supreme Court of Canada have continually confronted the dilemma of when an "action ought to be tried without a jury". In 2015, the Ontario Court of Appeal decided *Kempf v. Nguyen*,[24] in which it canvassed the old law and reaffirmed that the following principles should be considered by a trial judge when deciding whether to strike the jury. The Court of Appeal stated:

> [43] In the majority reasons in *Cowles v. Balac* (2006), 83 O.R. (3d) 660 [Court of Appeal], leave to appeal to [Supreme Court of Canada] refused, [2006] S.C.C.A. No. 496, O'Connor A.C.J.O. set out a comprehensive list of principles governing striking out a jury notice and appellate review of such a decision, as paraphrased here:
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> 1. The right to a trial by jury in a civil case is a *substantive right and should not be interfered with without just cause or cogent reasons* . . .
> 2. A party moving to strike the jury bears the onus of showing that there are features in the legal or factual issues to be resolved, in the evidence or in the conduct of the trial, that merit the discharge of the jury. The *overriding test is whether the moving party has shown that justice to the parties will be better served* by the discharge of the jury...

24. 2015 ONCA 114, 382 D.L.R. (4th) 105, 17 C.C.L.T. (4th) 177 (Ont. C.A.).

> 3. Appellate review of a trial court's exercise of its discretion to dispense with a jury is limited . . .
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> . . . . .
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> 5. The *complexity of a case is a proper consideration in determining whether a jury notice should be struck*. Complexity relates not only to the facts and the evidence, but also to the legal principles that apply to the case. Where one draws the line as to when a particular case would be better heard by a judge sitting alone is far from an exact science . . .
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> . . . . .
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> 7. It is reversible error for a trial judge to strike a jury notice on the basis that it would be difficult for her to explain the law to the jury . . .
> 8. In some cases, it is *preferable to take a "wait and see"* approach before deciding whether to discharge the jury. Experience has shown that in many instances the anticipated complexities of a case or other concerns do not materialize or at least not to the extent originally asserted.

Earlier, in *McDonald-Wright (Litigation Guardian of) v. O'Herlihy*,[25] the Ontario Court of Appeal affirmed that "although a trial judge has a wide discretion on a motion to strike a jury notice, the moving party has a substantial onus because trial by jury is a fundamental right". In *Brady v. Lamb*,[26] the Court of Appeal held that it is a drastic remedy to strike the jury because of improper prejudicial evidence being adduced. The Court of Appeal has also ruled that in certain circumstances it may be appropriate to have the jury decide only liability or damages while the judge is left with deciding the remainder of the claim.[27]

Stated succinctly, it can be seen that the case law establishes the following guiding factors in a motion to strike a jury:

1) The right to a civil jury trial is a fundamental, substantive right that should not be interfered with unless:
   a. The overriding justice of the case requires it, or
   b. The complexity of the case warrants it.
2) In any event a wait and see approach is preferable, but not mandatory, and if the jury can decide a part of the case they should.

25. 2007 ONCA 89, 220 O.A.C. 110, [2007] O.J. No. 478 (Ont. C.A.).
26. (2005), 30 C.C.L.I. (4th) 1, 78 O.R. (3d) 680, 205 O.A.C. 253 (Ont. C.A.).
27. *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 215 D.L.R. (4th) 193, 60 O.R. (3d) 665, [2002] O.J. No. 3109 (Ont. C.A.) at para. 69, confirming s. 108(3) of the *Courts of Justice Act*.

Complexity: Judges are More Educated than Jurors

"The overriding justice of a case" being hard to ultimately discern with little guidance from the courts so far, especially in light of the fundamental right to trial by jury, the practice at trial courts has devolved to whether the case is complex or not. This, in turn, usually devolves to an exercise of the lawyers arguing we have hired many experts, the experts speak in jargon, the jury cannot follow the jargon, *ergo* the jury should be struck. The long and short of it being the more experts a party hires, the more likely they can strike the jury.

The case law is replete with such logic. A recent example can be found in *Foniciello v. Bendall*,[28] a standard motor vehicle accident, brain injury case. In that case the motion judge decided to strike the jury based on the following logic:

(a) The trier of fact will be required to assess and evaluate a great deal of scientific evidence as the plaintiffs allege a brain jury. The jury must listen to and understand the expert witnesses who will explain how a brain works, what parts of the brain do, how a brain injury occurs, and what effects it might have.[29]
(b) The jurors must become educated with respect to brain anatomy and brain function. "I also agree that most jurors would not have any prior knowledge or experience regarding these matters and therefore the education of the jurors must take place at trial."[30]
(c) The jury will need to acquire a proper foundation of knowledge and then use that knowledge to assess the evidence of competing experts.[31]
(d) "In my view, there are certainly some advantages to having a judge try a complicated scientific case, as opposed to having a jury try the case. A judge is trained to learn on the job, to take notes, to ask questions if he does not understand, and to educate himself. A jury does not have that training."[32]

In essence, the judge decided that six Canadian citizens will not be able to understand competing experts in a brain injury trial and that a judge is better educated than the average Canadian and is therefore better suited to make findings of fact. In a sense, the judge took

28. 2014 ONSC 2204, 68 C.P.C. (7th) 70, [2014] O.J. No. 1672 (Ont. S.C.J.).
29. *Ibid.*, at para. 14.
30. *Ibid.*, at para. 15.
31. *Ibid.*, at para. 16.
32. *Ibid.*, at para. 19.

judicial notice of the fact that judges are smarter and better educated than six average Canadian citizens. He did this without any factual or scientific evidence to support such a demeaning proposition.

A 1988 trial decision in the Ontario High Court of Justice explains the fallacy of such reasoning:[33]

> Mr. Milligan, in a careful and articulate argument, submitted that my duty was to address the following questions taken from this passage of the judgment; namely which tribunal (judge or jury) is more likely to be able
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> > . . . to comprehend the evidence . . . to recollect it . . . to analyse it . . . and to weigh it.
>
> If I conclude that the answer is that a judge is the better tribunal, I must strike out the jury.
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> 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 analysing 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.
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> 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.

The complexity test given to us by the Court of Appeal encourages litigants who are motivated to strike the jury to hire more experts and obtain convoluted reports. This increases the time and expense put into each case and decreases access to justice. More problematically, it does not pay due attention to the fundamental good that juries play in our legal system and endorses a demeaning view of the average ability of Canadian citizens.

Who Sits On Juries

Jurors are composed of competent adults who are called by the court clerk. As jury lists are drawn from municipal pools of information, there is a possibility that higher socio-economic status individuals are more likely to attend for jury duty. That is because

33. *Strojny v. Chan* (1988), 26 C.P.C. (2d) 38, 1988 CarswellOnt 354, [1988] O.J. No. 201 (Ont. H.C.).

homeowners have to update the government with their home address for tax purposes every year, while renters do not. Jury notices, which are sent by mail, are more likely to reach a home owner than a renter.[34]

Even if an Ontario jury is randomly picked, the potential jurors are generally well educated. More than 50% of Canadians aged 25-64 have post-secondary education (college, university, or trade school), and at least 88% of adults aged 25-64 have graduated from high school.[35] For younger individuals in Ontario the rate of education is even higher, with 63% of people aged 25-34 having post-secondary education, which is the highest in Canada and among the highest in the world.[36]

Juries Reflect Society

Moreover, jurors possess common sense uninfluenced by legal indoctrination. The Supreme Court of Canada and the Court of Appeal agree that six Canadian citizens reflect societal values better than a single judge. In *Kempf*, the Court of Appeal relied on the Supreme Court as follows:[37]

> In addition to the wisdom of their collective life experience, a jury would bring to this action, as juries always do, a reflection of societal values. As Binnie J. wrote for the majority in *Whiten v. Pilot Insurance Co*., 2002 SCC 18 . . . "One of the strengths of the jury system is that it keeps the law in touch with evolving realities, including financial realities." In my view, this is an appropriate proceeding for a jury to apply "a healthy measure of common sense", as prescribed by Dickson C.J. in *Corbett*, at p. 692, in order to make findings of fact and determine liability for the accident.

The good thing about judges in Ontario is that, as a minimum, they must be a qualified lawyer for 10 years before they are appointed, which means that they have at least 14 years of legal training, including three years of law school and one year of articling. This is also the problem with judges.

34. *Supra* footnote 2.
35. Education at a Glance: OECD Indicators 2012: Canada; last accessed April 2, 2015, www.oecd.org/canada/EAG2012%20-%20Country%20note%20-%20Canada.pdf.
36. Statistics Canada, *Education Indicators in Canada: An International Perspective* (Toronto: Canadian Education Statistics Council, 2010), retrieved November 18, 2011 from www.statcan.gc.ca/pub/81-604-x/81-604-x2010001-eng.pdf.
37. *Kempf v. Nguyen*, 2015 ONCA 114, 382 D.L.R. (4th) 105, [2015] O.J. No. 750 (Ont. C.A.) at para. 60.

While they were learning to think like lawyers they were losing their ability to see legal problems through community standards. Judges are all too familiar with the availability of insurance as the motivating factor behind most personal injury law suits, they know that a plaintiff in a motor vehicle accident is not really suing the defendant but rather the defendant's insurance company, and they have none of the typical societal aversion to seeking money for injuries. Similar problems exist in other areas of civil law.

With a few exceptions, it is widely known in the personal injury bar that defence lawyers prefer to have cases tried by jury and plaintiff counsel prefer strike the jury because judges are typically softer and more forgiving of plaintiffs than juries especially in whiplash type claims. As we will see *infra*, there are exceptions to this rule.

Although rarely articulated as a factor in whether to strike a jury or not, the real reason plaintiff lawyers in personal injury actions bring motions to strike a jury is because they believe judges in general are more plaintiff friendly or because they like a particular trial judge. If the plaintiff lawyer thought that having a jury in their case was beneficial or the trial judge was defence oriented, no motion would be brought to strike the jury no matter how complex the action was. In fact, plaintiff lawyers would likely be offended by the idea that they are not skilled enough to explain complicated medical ideas to a jury.

The same is true of defence counsel. A defence counsel representing a large corporation against a plaintiff from a small town will move to strike a jury pulled from the small town jury pool, no matter how simple or complex the case is.

Judges are Better Able to Understand Complexity than Canadian Citizens

While many judges believe they are better note takers than the combined efforts of six citizens and can better understand a doctor's testimony, such a belief has never been factually demonstrated in any scientific capacity whatsoever. As such, a judge finding that they are better able to understand the factual complexity of a case than six average Canadian citizens is, in effect, taking judicial notice of the intellectual superiority of judges without a substantiating factual basis.

Given that more than half of Canadian adults between the ages of 24 and 65 have post-secondary education, it is quite possible that a judge with between five to seven years of post-secondary education

(and 11 years practice as a lawyer, including articling), is not more qualified to understand factual issues than six independent Canadian adults. This is especially true given that judges are likely untrained in healthcare and science and likely did not practice as civil litigation lawyers.[38]

Justice Quinn of the Ontario Superior Court of Justice has discussed the belief that judges are able to understand the concept in every field of law that comes before them. In *The Best Ways to a Judge's Heart*,[39] Justice Quinn candidly admitted that it is impossible for a judge to know everything about every matter that appears before them:

> You know more law than I do in the world of motor vehicle litigation. It is a specialized line of work. I am a generalist judge sitting in a generalist court, which means that, as each year passes, I know less and less about more and more and have reached the point where I now know very little about an awful lot . . .
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> . . . If you checked up on me you would find, I think, that I last presided over a motor vehicle trial in 2003. (And this is not by design. It is simply the way the docket has unfolded.) Imagine the learning ladder that I would have to climb if you and I were starting your trial tomorrow. In addition to the usual pressures preparing for trial, why should you have the additional stress of my education to worry about? That will always be a problem with generalist judges in a generalist court.
>
> Judges are not any smarter than you are and although, in an efficient legal system, the judge would always know the law more thoroughly than counsel, the fact is that I know less about motor vehicle and personal injury law than you know. My function is not even to provide the last word. I am a mere rest stop on the road to a final outcome. I am uninformed but well-intentioned.

Essentially, by creating the complexity arm of the test to strike the jury, the Court of Appeal has created a situation where judges are required to disparage the intelligence of six citizens, and without proof or any scientific evidence, the judge is forced to assume that they have superior intelligence.

If this is going to be the basis of the test, one would think that at the very minimum *some* scientific or psychological research could be put into the belief that judges are more intelligent than six jurors, with respect to comprehending, recollecting, analyzing and weighing factual evidence and credibility.

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38. Justice Quinn, *The Best Ways to a Judge's Heart*, *The Oatley McLeish Guide to Motor Vehicle Litigation 2015* (LSUC CPD, March 27, 2015).
39. *Ibid.* at paras. 19, 23 and 29.

Real Reasons Juries Are Struck

The dirty little secret of this whole area of jurisprudence is that lawyers almost never really move to strike a jury because of complexity. Almost without exception lawyers are motivated to strike a jury for tactical reasons they believe are beneficial to their side. Unfortunately, as a result of the way the law has evolved, they cannot be forthright in their intention and instead must argue the motion to strike under complexity.

In the United States, once a case has been decided jurors are allowed to be questioned about what went on in the jury room and what they thought about the case. In Canada, such questioning is illegal. Moreover, in the U.S. lawyers are entitled to hold *voir dires* to determine the suitability of potential jurors and ask them questions about their beliefs. In Canada, the only information provided about jurors is their name, address and occupation. As a result, psychological knowledge of juror motivation is much greater in the U.S. than Canada. Nevertheless, Canadian lawyers do rely on the research coming out of the United States.

In Canada, continuing legal education articles are replete with authors explaining various strategies as to when a lawyer should serve notice that they want the case tried with a jury. In virtually none of those articles is a consideration "the complexity" of a case. Instead leading lawyers focus on the psychological aspects of jurors that are likely to make their decision favourable to your side.[40]

Roger Oatley, a leading personal injury lawyer in Ontario, has said:[41]

> As a general rule, we try our cases before juries. Properly educated and sufficiently motivated to help your client, civil juries often award more generous damages than will a judge.[42]
>
> A jury is appropriate for resolving disputes in most cases. But there are exceptions. Juries should be avoided in the following circumstances:

40. See, for instance, Paul Jewell, "How I Persuade a Jury: Enhancing Your Family Law Damage Claims" (Summer 2002), *The Litigator* 23; Roger G. Oatley and Brennan Kahler, "Winning strategies in the civil jury process" (2003), 22:1 Advocates' Soc. J. No. 12-22, at paras. 3, 5 and 41; Jennifer E. DeThomasis, "Jury Selection – Intuition is Key" (Spring 2006), *The Litigation*, at p. 41; S. Block and C. Tape, eds., *Modern Trial Advocacy: Canada*, 2nd ed. (Indiana: National Institute for Trial Advocacy, 2000); Paul J. Scoptur, "How Good Lawyers Lose Good Cases: Anticipating and Overcoming Jury Bias", OTLA CPD.
41. Oatley and Kahler, *ibid.*, at paras. 3, 5 and 41.
42. While Roger Oatley does tend to serve jury notices in his cases, this is by no means the industry norm for personal injury lawyers.

- When the plaintiff is not likeable.
- When liability is very difficult.
- When the theory of damages or legal foundation for your case is difficult to understand.
- When you do not possess the skill or personality to advocate effectively before a jury.

> As a general rule, potential jurors who are most like your client should relate to your client and support your case. We also look for jury panelists possessing sufficient intellect to understand and feel comfortable working with (and awarding) significant amounts of money. We try to avoid jury panelists we believe are apt to control the outcome – putting all of your eggs in one basket is risky business. Finally, we generally try to keep teachers off our panels.

While Mr. Oatley does argue that a jury should be avoided if the foundation of the case is difficult to understand, I would suggest that he means against common sense (such as where a plaintiff blows through a stop sign and then sues the defendant who had the right of way),[43] rather than complex. Mr. Oatley has had success in explaining even the most complicated medical malpractice arguments to juries where it was in his client's best interest to do so.

a) Jurors factor in extraneous decisions concerning likeability

In personal injury cases, plaintiff's counsel know that if their plaintiff is young, likeable and attractive, they will likely do well with the jury. If their plaintiff is of the same ethnicity as the majority of the jury panel it is also helpful. Accordingly, they will argue against a motion brought by the defendant to strike the jury on the basis that the action is relatively simple.

Conversely, if their plaintiff has a sordid criminal past, is a child molester, unlikeable, or a member of a minority in front of all white jurors, the same case becomes unduly complex and the jury must be struck by plaintiff's counsel.

The same is true of defence counsel. If the plaintiff is a convicted child molester who suffered a broken bone in a car accident, it does not matter if the case involves cutting edge science even most doctors would barely understand, it is not going to be too complex for the jury in the eyes of a defence lawyer.

Every practising lawyer appreciates that a judge can separate legal arguments from emotion to a much greater extent than a jury. It is what they are trained to do in law school and in practice. Whether a

43. Mr. David Zuber and I recently defended one such case where Mr. Oatley's plaintiff went through a stop sign without stopping.

lawyer wants emotion involved in a decision will dictate whether they argue the trial is complex or not.

b) Similarity to Plaintiff

Jurors who are similar to either the plaintiff or defendant are more likely to empathize with their position and find in their favour.[44] Jury consultants always advise lawyers to select jurors who have characteristics and backgrounds that are similar to their client. Psychological studies have shown that jurors are more likely to believe witnesses they like or with whom they have something in common.[45]

While this theory of jury selection is limited when both parties are similar, it is quite effective when the characteristics of the plaintiff are very different from the defendant, such as where a blue-collar plaintiff is up against a multi-national corporation. An example of this theory at work is the *Apple v. Samsung* patent dispute, heard in the California jurisdiction of Apple's head office. Just knowing the location of the trial alone is enough to suggest the verdict. Not surprisingly, when similar suits were brought by Samsung against Apple in Korea the opposite verdict was reached.

c) Judges know about insurance

It is usually a serious transgression to mention the existence of insurance in a jury trial. Although the Supreme Court of Canada has said the transgression does not automatically result in a mistrial or striking of the jury and can be cured with direction from the judge, it is most perilous to risk mentioning the existence of insurance. The rationale behind this is that jurors will more easily dispense the defendant's money to a plaintiff when they know it is not the defendant paying personally.

This rationale is most certainly correct, because judges quite obviously dispense the defendant's money more easily when they know that it is only an insurance claim they are adjudicating. The problem arises though, that judges virtually always know when insurance is involved and when it is not. Ergo, plaintiffs are motivated to strike the jury to more easily access insurance money by relying in the inherent judicial bias common to most, if not all, judges.

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44. Jennifer E. DeThomasis, "Jury Selection – Intuition is Key", *The Litigator* (Spring 2006), p. 41; S. Block and C. Tape, eds., *Modern Trial Advocacy: Canada*, 2nd ed. (Indiana: National Institute for Trial Advocacy, 2000).
45. *Ibid.*

d) Body Language

Anyone who has run a trial knows that jurors telegraph their thoughts through body language. Lawyers can tell when jurors crinkle their brow because they do not understand or close their eyes because they are bored, they can tell if jurors smile in appreciation when they talk or look down and scratch their temple during their key witnesses.

Great trial lawyers are in tune with what their jury is thinking; if they can tell the jury is not on their side that moment would seem to be opportune to strike the jury (and even mediocre lawyers can tell when a judge is on their side).

e) Stereotypes

Everybody holds stereotypes: judges, lawyers and juries. Plaintiff and defence lawyers hold stereotypes about the type of person who is more likely to award money to an injured plaintiff. We will not canvass the stereotypes in society of which people are more likely to be circumspect with their money and those who are more likely to be willing to spread it around; however, it is certainly true that defence lawyers tend to believe that unionized workers are more likely to feel entitled to give money for nothing and so are often peremptorily challenged. A defence lawyer who has used all their peremptory strikes, but is left with a lot of jurors about whom they hold negative stereotypes is likely to argue that the case is too complex.

Challenging jurors on the basis of racial discrimination was at one point common through both Canada and the United States. In 1965, the Supreme Court of the United States decided *Batson v. Kentucky*,[46] where it was found that the prosecutor used his peremptory challenges to strike every black juror from the trial of a black accused. Such conduct was ruled by the court to violate the equal protection clause of the Constitution. However, whether *Batson* and the subsequent case law actually eliminated racial bias in jury selection or simply forced racist prosecutors to find non-racist rationales is debatable.

f) Opposing Counsel

Lawyers evaluate each other constantly. If a lawyer knows the opposing lawyer has never conducted a jury trial, there is a significant intimidation factor in forcing the trial to proceed before a jury and resisting a motion to strike the jury.

46. 90 L.Ed.2d 69, 106 S.Ct. 1712, 476 U.S. 79 (U.S. Ky. S.C., 1986).

g) Jury Bias

American jury consultants have demonstrated that psychology offers insight into the inner workings of jurors' thinking. Dozens of articles have been written about these biases;[47] the main ones can be summarized as:

1) Attribution Bias – a social psychology concept where jurors downplay the external causes of events and attribute negative outcomes to the personal choices of the plaintiff. In personal injury and criminal jury trials it is essentially blaming the victim, because jurors do not like the idea that bad things happen to good people.
2) Confirmation bias – jurors form their opinion of the case on the information they hear first. Once they have their theory of the case they are keen to listen to confirming evidence and tend to discount contradictory evidence.
3) Availability bias – is the argument that jurors tend to attribute causes to concepts that they hear often. They think that many lawsuits are frivolous due to incessant plaintiff lawyer ads they hear on TV.
4) Primacy and recency bias – the idea that jurors remember the things they hear first and last more than the stuff in the middle. This is advantageous to plaintiffs in a civil trial as they get to make opening statements first and closing statements last.
5) Belief perseverance bias – describes the tendency we all have to resist changing our minds once we have settled on an explanation for some event.

h) Jury Trials Are Time Consuming

There is also a suspicion among counsel that judges prefer to hear a case without a jury because it cuts down on the work and time a judge must put into hearing a case. It also eliminates the possibility that a judge can get overturned on instructions to the jury and permitting prejudicial evidence to go before the jury. Such concerns, of course, could never be openly admitted in a decision to strike a jury but there are implications for access to justice if they were. Simply put, more cases could go to trial in a year if cases were heard by judge alone, and costs exposure would be reduced for the litigants. (In fact, one might argue that resisting a motion to strike the jury

47. *Supra* footnote 38, for instance.

should be considered in the overall cost consequences in that juries drive up costs.)

Conclusion

So where does this leave us? The courts in Ontario have created a test to strike the jury that is essentially based on complexity. Although the first part of the test recognizes the ancient and fundamental right to trial by jury, it is not a constitutional right in Canada for civil action, and judges retain discretion to eliminate the jury where overriding justice requires it. The case law has not delved into what might constitute overriding justice, preferring instead to limit itself to concerns of complexity.

This is an impoverished view of what should be a workable test. The dirty little secret of this area of jurisprudence is that no lawyer actually doubts their ability to explain their case to the jury and instead decides whether to attempt to strike the jury based on tactical reasoning and jury bias.

If judges strengthened the first part of the test concerning overriding justice and were open to considering lawyers' real reasons for striking the jury, the law could be brought into conformity with reality.

The right to a jury trial is an ancient and important right, but sometimes justice requires that the jury be struck. Jurisdictions around the world have reached the conclusion that justice is better served by having a judge decide these matters rather than six average citizens. If a jury is likely to be biased against one party in favour of the other, as jury research has demonstrated that they sometimes are, this should be openly admitted and argued in court. It is much less demeaning than arguing that six Canadians are not smart enough to understand a case. Similarly, if jury trials are driving up costs and reducing access to justice this is an important consideration that should be argued.

The test as it exists permits judges to exercise their discretion to eliminate juries where justice requires it. Perhaps making the first arm of the test a little more robust would reduce the reliance on flimsy legal reasoning concerning complexity.