REPORT

ON

THE USE OF JURY TRIALS IN CIVIL CASES

ONTARIO LAW REFORM COMMISSION

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ONTARIO LAW REFORM COMMISSION

1996

The Ontario Law Reform Commission was established by the Ontario Government in 1964 as an independent legal research institute. It was the first Law Reform Commission to be created in the Commonwealth. It recommends reform in statute law, common law, jurisprudence, judicial and quasi-judicial procedures, and in issues dealing with the administration of justice in Ontario.

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Ontario
Law Reform
Commission

The Honourable Charles Harnick
Attorney General for Ontario

Dear Attorney:

I have the honour to submit the Ontario Law Reform Commisison's *Report on the Use of Jury Trials in Civil Cases*.

John D. McCamus
Chair

October, 1996

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PREFACE

In late 1993, the Commission was asked by the then Deputy Attorney General to conduct a study of the civil jury, and to make recommendations with respect to its future use. In order to ensure that the Commission consulted widely before arriving at its final recommendations, the Commission published its *Consultation Paper on the Use of Jury Trials in Civil Cases* in March 1994.

The Commission wishes to express its gratitude, once again, to Paul M. Perell, Weir & Foulds, for his indispensable contribution to the preparation of the consultation paper. The Commission also wishes to record its thanks to all of the individuals and groups that responded to the consultation paper. Their submissions were of great assistance to the Commission in formulating its final proposals. The Commission wishes especially to acknowledge the contributions of the Canadian Bar Association—Ontario and the Advocates' Society, both of which conducted surveys of their members before drafting their responses to the consultation paper. In particular, the Commission wishes to thank Leonard Walker, Chair of the Civil Litigation Section of the Canadian Bar Association—Ontario and Frank K. Gomberg, Chair of the Civil Jury Review Committee of the Advocates' Society.

Subsequent to the consultation process, the Commission conducted a number of further studies. The first was an analysis of the relative length of jury and non-jury civil trials. The Commission wishes to thank Karen Atkin, Karen Atkin Research Associates, who conducted this study on behalf of the Commission. The results of this study were critical in assisting the Commission in arriving at its conclusions. The Commission also examined the additional costs associated with jury trials in civil cases. In connection with this study, the Commission wishes to thank the following individuals, who provided the Commission with essential statistical information: John Twohig, Policy Branch, Ministry of the Attorney General; and Pardip Bedi, Warren Dunlop, and Dorothy Gonsalves-Singh, Courts Administration Program, Ministry of the Attorney General. In addition to these studies, the Commission conducted a survey of Regional Senior Justices of the Ontario Court of Justice (General Division), and a survey of past civil jurors. The Commission wishes to record its thanks to all of the respondents to these surveys.

Finally, the Commission wishes to express its appreciation to Howard Goldstein, Counsel at the Commission, who prepared an initial draft of this report, J.J. Morrison, Senior Counsel at the Commission, who was responsible for completing the report, and Cora Calixterio, for her secretarial assistance in preparing the report for publication.

CHAPTER 1

INTRODUCTION

The civil jury has a long history in the province of Ontario, where juries have been available for civil actions for over 200 years. Although the civil jury is an established feature of our legal system, it has had a number of critics and detractors over the years. In the last thirty years, in particular, the civil jury has been studied by a number of governmental commissions, which have recommended severely limiting its availability.

In 1968, for example, the *Royal Commission Inquiry into Civil Rights*[1] recommended that trial by jury should be abolished for all civil cases, except those based on defamation.[2] The McRuer Report stated that "the trial of civil cases by a jury is a procedure that has outlived its usefulness in Ontario".[3] This conclusion was based on the view that the plaintiff's counsel in a personal injury case—which is the type of civil case that is most frequently tried before a jury—is usually less experienced than counsel for the defendant, who has normally been retained by an insurance company. As a result, the McRuer Report concluded that the jury was no longer protecting the weak, but rather was "a weapon in the hands of the strong".[4]

In 1973, the Ontario Law Reform Commission considered the civil jury within the context of the administration of Ontario courts generally, and reached a similar conclusion.[5] The Commission referred specifically to motor vehicle actions, which, it noted, constituted the majority of civil jury trials. The Commission also noted that, in these cases, the jury was used primarily for tactical advantage, not for the preservation of the litigants' liberties.[6] As a result, the Commission recommended that "[c]ivil juries should be abolished except in the case of actions for libel, slander, malicious arrest, malicious

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1 Ontario, *Royal Commission Inquiry into Civil Rights* (1968), Report No. 1, Vol. 2 (hereinafter referred to as the "McRuer Report").

2 *Ibid.*, at 859-60.

3 *Ibid.*, at 860.

4 *Ibid.*

5 Ontario Law Reform Commission, *Report on Administration of Ontario Courts* (1973), Part I, at 329-50.

6 *Ibid.*, at 336.

prosecution and false imprisonment".[7] The Commission's recommendation provoked numerous articles from both the bar and the bench in defence of the civil jury.[8]

Over twenty years have passed since the Commission recommended circumscribing the availability of the jury for civil cases. Given the passage of time and developments in the law, such as the enactment of legislation limiting the right of a person injured in a motor vehicle accident to maintain a tort action,[9] the availability of the civil jury merited reconsideration. In late 1993, the Ontario Courts Management Advisory Committee, whose task is to review and provide advice with respect to court management in the province,[10] requested that the Deputy Attorney General initiate an investigation of the current use of the jury in civil cases. The Deputy Attorney General, in turn, asked the Commission to conduct a new study of the civil jury and make recommendations with respect to its future use. The Commission was specifically requested to consider whether the additional public costs associated with jury trials could be justified in civil cases.

In March 1994, the Commission released its *Consultation Paper on the Use of Jury Trials in Civil Cases.*[11] In the consultation paper, the Commission reviewed the arguments both for and against the retention of civil jury trials,

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[7] *Ibid.*, at 350.

[8] For articles in support of the retention of the civil jury, both before and after the Commission's report, see, for example, Martin, "The Role of a Jury in a Civil Case", in *Special Lectures of the Law Society of Upper Canada 1959*[:] *Jury Trials* (1959) 167; Kennedy, "Should the Use of Juries for the Trial of Civil Actions be Abolished or Limited?" (1966), Chitty's L.J. 367; Haines, "The Future of the Civil Jury" in Linden (ed.), *Studies in Canadian Tort Law* (1968) 10; Maloney, "The Challenge to the Retention of Civil Juries" (1974), 8 Gazette 166; Haines, "The Role of the Jury in the Control of the Abuse of Power", in *Special Lectures of the Law Society of Upper Canada 1979*[:] *The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control* (1979) 31; Sommers and Firestone, "In Defence of the Civil Jury in Personal Injury Actions" (1987), 7 Advocates' Q. 492; MacIntyre, Manes, and McGrenere, "More in Defence of the Civil Jury in Personal Injury Actions" (1987), 8 Advocates' Q. 109; Gaetz, "Jury Trials in Civil Actions" (1988), 22 Gazette 119; and Kenny, " 'Loonies' and the Law: Jury Costs and the Lack of Civil Jury Trials in Canada" (1991), Am. Rev. Can. Stud. 45.

[9] See, now, *Insurance Act,* R.S.O. 1990, c. I.8, s. 267.1, as en. by S.O. 1993, c. 10, s. 25.

[10] The Ontario Courts Management Advisory Committee is established pursuant to s. 73 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43. Its function, set out in s. 73(4) of the Act, is "to consider and recommend to the relevant bodies or authorities policies and procedures to promote the better administration of justice and the effective use of human and other resources in the public interest".

[11] Ontario Law Reform Commission, *Consultation Paper on the Use of Jury Trials in Civil Cases* (1994).

and arrived at a tentative conclusion. The consultation paper was intended to stimulate discussion about the future of the civil jury among interested members of the bench, the bar and the general public, in order to provide the Commission with the best possible information and advice before arriving at its final recommendations.

In this report, the Commission reviews the consultation paper and the subsequent consultation process. In addition, it presents the findings of two studies conducted by the Commission following the release of the consultation paper, respecting the length and cost of civil jury trials and the views of former civil jurors. The report concludes with the Commission's final recommendations respecting the use of juries in civil cases.

CHAPTER 2

THE CIVIL JURY IN ONTARIO—BACKGROUND

1. ORIGINS OF THE CIVIL JURY IN ONTARIO

The history of the civil jury in Ontario predates confederation. The civil jury was introduced in Upper Canada in 1792 by the second act of the legislature.[1] It is interesting to note that the preamble to that Act provided, in part, as follows:[2]

> 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...

The above preamble illustrates clearly the origins of the civil jury in Ontario. It was imported from England, where it was seen by many as a cornerstone of a democratic society. The sentiment expressed in this eighteenth century document remains for many people today a compelling reason for maintaining the civil jury.

At the time of its institution, juries were mandatory for civil trials. The introduction of the jury for civil cases in Upper Canada was a reform aimed at dealing with discontent with the existing civil courts, which were dominated by judges and local merchants who were able to shape the law in an unfettered fashion.[3] Unfortunately, the advent of the civil jury brought with it its own problems. At the time the sheriff enjoyed absolute discretion in composing the jurors' roll. The sheriff's discretion often led to "jury packing", which involved a less than impartial selection of jurors, with a view to selecting only those jurors who were sympathetic to the local elite.[4]

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1 *An act to establish trials by jury,* 1792, 32 Geo. 3, c. 2 (Upper Can.).

2 *Ibid.*

3 Much of the history of the civil jury set out here is drawn from Romney, "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture"(1989), 7 Law & Hist. Rev. 121.

4 *Ibid.*, at 130-31

Criticism of jury packing continued for decades before the practice was finally abolished in 1850, when a comprehensive statutory reform of the jury system was passed.[5] Interestingly, as soon as the reform was enacted, the jury itself came under attack from the legal profession. As one legal historian has noted, "[i]ts reputed age-old role as a guardian of civil rights and liberties was forgotten; suddenly it was a medieval relic, costly and inefficient, which continued to clog the machinery of justice only through the inertia of public will".[6] This mid-nineteenth century critique of the jury as being inefficient and costly is a theme that has been revisited periodically over the past 150 years by opponents of the civil jury who, for whatever reason, seek its abolition.

As we noted in our 1973 *Report on Administration of Ontario Courts,*[7] after 1856 a civil trial could be conducted before a judge alone if all parties consented. Thus, there was an exception to the presumption that civil trials would be held before a jury. In 1868, the presumption that civil trials were to be heard by a jury was reversed. Thereafter, most civil actions were to be tried by a judge alone, unless a jury was requested by one of the parties.[8] However, trial by jury did continue to be prescribed for a small group of tort actions—most notably defamation and malicious prosecution—unless the parties waived such a trial.[9]

2. THE PRESENT LAW OF ONTARIO

In Ontario, juries are no longer mandatory for any type of case, and continue to be optional in many cases. Since 1955, civil juries have been composed of six rather than twelve members,[10] with the agreement of only five members being required for a verdict.[11] In order to obtain a jury for a civil matter a party must serve a jury notice under rule 47.01 of the Rules of Civil Procedure.[12] With proper grounds, a party may move to have the jury notice struck out and the

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5 *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.).

6 Romney, *supra,* note 3, at 138.

7 Ontario Law Reform Commission, *Report on Administration of Ontario Courts* (1973), Part I, at 330.

8 *The Law Reform Act of 1868,* 32 Vict., c. 6 (Ont.), s. 18(1).

9 *The Administration of Justice Act of 1873,* 36 Vict., c. 8 (Ont.), s. 17.

10 See, now, *Courts of Justice Act,* R.S.O. 1990, c. C.43, s. 108(4).

11 See, now, *ibid.,* s. 108(6).

12 R.R.O. 1990, Reg. 194.

action tried by a judge alone.[13] However, the cases establish that the right to a jury trial is a substantive right of great importance, which is not to be taken away except for cogent reasons.[14] Where an order striking out a jury notice is refused at the interlocutory stage, the trial judge retains the discretion to try the case without a jury.[15]

This procedural scheme is based on section 108(1) of the *Courts of Justice Act,*[16] which provides that "[i]n an action in the Ontario Court (General Division) that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided". Section 108(2) of the Act prohibits jury trials for certain types of claim, most of which concern the court's equitable jurisdiction, but which also include matters such as family law proceedings. As a matter of jurisdiction, juries have never been available for equitable claims. Section 108(2) of the Act provides as follows:

> 108.—(2) The issues of fact and the assessment of damages in an action shall be tried without a jury in respect of a claim for any of the following kinds of relief:
>
> 1. Injunction or mandatory order.
> 2. Partition or sale of real property.
> 3. Relief under Part I, II or III of the *Family Law Act* or under the *Children's Law Reform Act*.
> 4. Dissolution of a partnership or taking of partnership or other accounts.
> 5. Foreclosure or redemption of a mortgage.
> 6. Sale and distribution of the proceeds of property subject to any lien or charge.
> 7. Execution of a trust.
> 8. Rectification, setting aside or cancellation of a deed or other written instrument.
> 9. Specific performance of a contract.
> 10. Declaratory relief.
> 11. Other equitable relief.
> 12. Relief against a municipality.

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13 *Ibid.*, r. 47.02(1) and (2).

14 *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528, and *Such v. Dominion Stores Ltd.*, [1961] O.R. 190 (C.A.).

15 Rules of Civil Procedure, *supra*, note 12, r. 47.02(3).

16 *Supra*, note 10.

Given the origin of the jury as a means of tempering the perception of abuse of power, it is significant that jury trials are not available in actions against the government. Section 108(2)12 of the *Courts of Justice Act,* reproduced above, prohibits jury trials in civil actions against a municipality. Similarly, section 11 of the *Proceedings Against the Crown Act*[17] prohibits jury trials in civil actions against the provincial Crown. Juries are prohibited in proceedings against the federal Crown by section 26 of the federal *Crown Liability and Proceedings Act.*[18]

In 1989, two additions were made to the *Courts of Justice Act* that are relevant to the arguments for and against civil jury trials.[19] Section 118 of the Act provides that, "[i]n an action for damages for personal injury, the court may give guidance to the jury on the amount of damages and the parties may make submissions to the jury on the amount of damages". Section 119 provides that, "[o]n an appeal from an award for damages for personal injury, the court may, if it considers it just, substitute its own assessment of the damages".

3. THE USE OF CIVIL JURIES

Although the frequency of jury trials for civil cases in Ontario has been diminishing generally over time,[20] statistics gathered by the Ministry of the Attorney General suggest that there has been a slight increase in the use of the civil jury in recent years.[21] According to the Ministry's statistics, there has been a seven percent increase in the proportion of civil cases tried by jury over the past seven reported years. Table No. 1, below, sets out the civil trial statistics for

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17 R.S.O. 1990, c. P.27.

18 R.S.C. 1985, c. C-50, s. 26, as en. by S.C. 1990, c. 8, s. 31. The title of the statute was changed by S.C. 1990, c. 8, s. 21.

19 *Courts of Justice Act, 1984,* S.O. 1984, c. 11, ss. 130a and 130b, as en. by S.O. 1989, c. 67, s. 4. See, now, *Courts of Justice Act, supra,* note 10, ss. 118 and 119. These amendments implemented recommendations made by the Commission in Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987), at 108-09. See, also, ss. 15 and 16(1) of the draft *Personal Injuries Compensation Act* proposed by the Commission in Appendix 1 of the report.

20 See *Report on Administration of Ontario Courts, supra,* note 7, at 329-31.

21 Unless otherwise indicated, the statistics provided in this chapter are derived from the Ministry of the Attorney General, *Court Statistics Annual Reports,* which compile statistics based on the fiscal year ending on March 31st.

a seven-year period between 1988 and 1995. These figures disclose a small increase in the use of juries for civil trials since 1990/91.[22]

Table No. 1
Civil Trials—Ontario Court (General Division)

	1988/89	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
non-jury	2,292 (84.6%)	2,055 (86.5%)	2,024 (84,7%)	2,400 (81.6%)	2,744 (79.6%)	2,473 (78.2%)	2,032 (77,8%)
jury	418 (15.4%)	318 (13.4%)	367 (15.3%)	540 (15.3%)	702 (20.4%)	688 (21.7%)	577 (22.1%)
total	2,710	2,373	2,391	2,391	3,446	3,161	2,609

In compiling its statistics on civil trials, the Ministry distinguishes between motor vehicle actions, on the one hand, and all other kinds of action, on the other. Table No. 2, below, provides a breakdown of civil trials by type of action. These figures reveal that approximately three-quarters of all civil jury trials involve motor vehicle actions.

Table No. 2
Civil Actions—Mode of Trial
Ontario Court (General Division)

	1991/92	1992/93	1993/94	1994/95
MV-non-jury	450 (15.3%)	473 (13.7%)	357 (11.3%)	281 (10.8%)
other-non-jury	1,950 (66.3%)	2,271 (65.9%)	2,116 (66.9%)	1,751 (67.1%)
MV-jury	394 (13.4%)	520 (15.1%)	499 (15.8%)	389 (14.9%)
other-jury	146 (5.0%)	182 (5.3%)	189 (6.0%)	188 (7.2%)
total	2,940 (100%)	3,446 (100%)	3,161 (100%)	2,609 (100%)

A review of the statistics over the past two decades reveals that jury trials have become more popular over time. In the 1988 *Report of Inquiry into Motor Vehicle Accident Compensation in Ontario,*[23] the use of civil juries in motor vehicle actions was studied over a four-year period. As Table No. 3 demonstrates, motor vehicle jury trials increased in popularity over the four-year span.[24]

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[22] In light of the empirical study conducted by the Commission in connection with this report, there is some evidence to suggest that the statistics provided by the Ministry in respect to the number of jury trials are somewhat inflated. See *infra*, ch. 6, sec. 1(b).

[23] Ontario, *Report of Inquiry into Motor Vehicle Accident Compensation in Ontario* (1988).

[24] *Ibid.*, Vol. 1, at 368-69. The table presents the aggregate statistics for motor vehicle actions set down for trial in both the Supreme Court of Ontario and the District Court of Ontario.

Table No. 3
Motor Vehicle Actions Set Down for Trial

	1982	1983	1984	1985
Non-jury	3,134 (58%)	2,918 (56%)	2,793 (51%)	2,861 (51%)
Jury	2,239 (42%)	2,328 (44%)	2,634 (49%)	2,722 (49%)
Total	5,373 (100%)	5,246 (100%)	5,427 (100%)	5,583 (100%)

More recent data for the 1992 and 1993 calendar years reveal a sharper increase in the use of juries in motor vehicle actions. Table No. 4 discloses a marked increase in the number of motor vehicle cases in both 1992 and 1993. Anecdotal evidence suggests that this trend is a consequence of the greater use of the jury by defendants, whose defences are usually conducted by the insurance companies that insure them. Anecdotal evidence further suggests that the appeal of the jury for insurance companies stems from the tendency of juries, in Ontario, to make smaller awards of damages than judges. This observation will be discussed in greater detail, below.[25]

Table No. 4
Motor Vehicle Actions Set Down for Trial

	1992	1993
Non-jury	2,822 (33.8%)	1,835 (29.3%)
Jury	5,528 (66.2%)	4,419 (70.7%)
Total	8,350 (100%)	6,254 (100%)

As a result of the enactment of legislation limiting tort claims for motor vehicle actions,[26] there is reason to believe that the frequency of motor vehicle actions, including those before juries, will be reduced further as the full impact of this legislation is realized.* The effect of this legislation to date is reflected in

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25 See *infra*, ch. 4, sec. 3(b).

26 *Insurance Act*, R.S.O. 1990, c. I.8, s. 267.1, as en. by S.O. 1993, c. 10, s. 25.

* The prediction of a long term reduction in the number of motor vehicle actions is contingent upon the continued existence of the current legislation. As this report was prepared for press, the Ministry of Finance issued draft legislation to amend the *Insurance Act* and other Acts related to automobile insurance. Among other things, s. 14 of the proposed *Insurance Statute Law Amendment Act, 1996* would restore the right to sue for significant economic loss in excess of the no-fault benefits. This legislation, if enacted, might have a significant affect on the number

the Ministry statistics set out in Table No. 5, below. The table discloses a marked decrease in the number of motor vehicle actions commenced in the 1992/93 fiscal year, and a further significant decrease in the number of motor vehicle actions commenced in the 1993/94 fiscal year. Interestingly, while the total number of motor vehicle actions decreased sharply in 1992/93, the actual number of motor vehicle actions tried with a jury increased. A somewhat similar phenomenon occurred in 1993/94. These increases, however, are likely related to cases commenced in previous years that are only now proceeding to trial. Accordingly, it will probably take a few more years before the full impact of "no-fault" legislation on civil juries can be observed. It would seem reasonable to assume, however, that a substantial decrease in motor vehicle actions would result in fewer civil jury trials.

Table No. 5
Motor Vehicle Actions Commenced
Ontario Court (General Division)

	1988/89	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
actions	26,394	35,874	26,064	22,930	7,032	3,651	3,752

Given that the majority of civil jury trials involve motor vehicle actions, and that the number of such actions has decreased dramatically over the past few years, there is a basis for predicting that, in the absence of further statutory reform concerning motor vehicle actions, a sharp decrease in civil jury trials will occur.

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of motor vehicle actions commenced and, consequently, on the number of jury trials conducted in the province.

CHAPTER 3

EXPERIENCE IN OTHER JURISDICTIONS

1. CIVIL JURY TRIALS IN OTHER JURISDICTIONS—ENABLING LEGISLATION

Civil jury trials are available in all other Canadian provinces,[1] except Quebec, where they were abolished in 1976.[2] Jury trials are also available for civil actions in England.[3] Civil juries are available in these jurisdictions under various enabling schemes.

In Manitoba and Nova Scotia, unless the right is waived by the parties, jury trials are required where an action is for defamation, malicious arrest, malicious prosecution, or false imprisonment. In Nova Scotia, actions for criminal conversation and seduction are added to this list.

In Alberta, jury trials are not mandatory, but are available for defamation; malicious arrest; malicious prosecution; seduction; breach of promise for marriage; tort, where the damages exceed $10,000; and the recovery of property, where its value exceeds $10,000. The scheme is similar in Saskatchewan, except there is no action for seduction and a jury trial is available in an action where the amount claimed exceeds $10,000. The Alberta and Saskatchewan schemes preclude jury trials for actions not included in the list of permitted claims.

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1 Alberta, *Jury Act,* S.A. 1982, c. J-2.1, s. 16, Alberta Rules of Court, rr. 234 and 235; British Columbia, *Supreme Court Act,* S.B.C. 1989, c. 40, s. 15, *Jury Act,* R.S.B.C. 1979, c. 210, ss. 13-21, Rules of Court, r. 39(24)-(30); Manitoba, *The Court of Queen's Bench Act,* S.M. 1988-89, c. 4, s. 64, *The Jury Act,* R.S.M. 1987, c. J30, s. 32, Court of Queen's Bench Rules, r. 48; New Brunswick, *Jury Act,* S.N.B. 1980, c. J-3.1, s. 33, Rules of Court, r. 46; Newfoundland, *Jury Act, 1991,* S.N. 1991, c. 16, s. 32, Rules of the Supreme Court, 1986, r. 45; Nova Scotia, *Judicature Act,* R.S.N.S. 1989, c. 240, s. 34, *Juries Act,* R.S.N.S. 1989, c. 242, s. 13, Civil Procedure Rules, r. 28.03; Prince Edward Island, *Jury Act,* S.P.E.I. 1992, c. 37, s. 3, Civil Procedure Rules, r. 47.01; Saskatchewan, *The Jury Act, 1981,* S.S. 1980-81, c. J-4.1, ss. 14-22, Rules of Court, r. 196.

2 *Jurors Act,* S.Q. 1976, c. 9, s. 56.

3 *Supreme Court Act 1981,* c. 54 (U.K.), s. 69, Rules of Supreme Court, O.33, rr. 2 and 5.

Saskatchewan, however, has a unique provision that a judge, upon application, may order a jury trial where "(a) the ends of justice will be best served if findings of fact are made by representatives of the community; or (b) the outcome of the litigation is likely to affect a significant number of persons who are not party to the proceedings".[4]

In England, jury trials are required in the Queen's Bench Division if, upon application, the court is satisfied that there is in issue a charge of fraud against the party applying for the action to be tried with a jury, or a claim is made for defamation, malicious prosecution, or false imprisonment. The court in England has a discretion to order a jury trial in other cases. The approach is similar in New Brunswick and in Newfoundland where, however, fraud has been deleted from the list and breach of promise of marriage has been added. Newfoundland has also added seduction. In England, questions of foreign law are to be decided by a judge alone.

In British Columbia and Prince Edward Island, jury trials are precluded for certain listed claims, but are otherwise available. While the details of the lists vary, in general, equitable claims such as claims for injunctions, specific performance, and the administration and execution of estates and trusts, are precluded.

Subject to those actions in respect of which jury trials are precluded, if any, in England, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, and Saskatchewan, jury trials are available variously upon court order or upon serving a jury notice.

In England, Alberta, British Columbia, Nova Scotia, Prince Edward Island, and Saskatchewan, the legislation provides that, notwithstanding a request for a jury, a judge may order that the action be tried without a jury. In England, Alberta, British Columbia, and Newfoundland, this power may be exercised where the trial will involve scientific investigations, complex issues, or prolonged examination of documents or accounts.

The enabling legislation in the other jurisdictions in Canada and in England is summarized in the following table:

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4 *The Jury Act, 1981* (Sask.), *supra*, note 1, s. 17(1).

Table No. 1
Enabling Legislation for Civil Juries in Other Jurisdictions

	Jury mandatory unless waived for:	Jury permitted by notice or by application for:	List of claims for which jury precluded	Fee charged for jury trial
England	n.a.	fraud, defamation, malicious prosecution, false imprisonment, others claims discretionary	n.a.	no
Alta.	n.a.	defamation, malicious arrest, malicious, prosecution seduction, breach of promise, torts ($10,000+), property ($10,000+)	n.a.	yes
B.C.	n.a.	all save precluded	yes	yes
Man.	defamation, malicious arrest, malicious prosecution, false imprisonment	all claims	n.a.	yes
N.B.	n.a.	defamation, malicious prosecution, false imprisonment, breach of promise, other claims discretionary	n.a.	no
Nfld.	n.a.	defamation, malicious prosecution, false imprisonment, breach of promise, seduction, other claims discretionary	n.a.	yes
N.S.	defamation, malicious arrest, malicious prosecution, false imprisonment, criminal conversation, seduction	all claims	n.a.	no
P.E.I.	n.a.	all save precluded	yes	yes
Sask.	n.a.	defamation, malicious arrest, malicious prosecution, breach of promise, claims over $10,000, community involvement in interests of justice	n.a.	yes

2. THE USE OF CIVIL JURY TRIALS IN OTHER JURISDICTIONS

(a) CANADA AND ENGLAND

A variety of sources indicate that juries are rarely used in civil cases in other jurisdictions. In England, the case law suggests that, apart from those actions for which a jury trial is generally required if requested, an order for a jury trial is rarely made; and, in actions for personal injury, an order for a jury trial will not be made unless there are exceptional circumstances.[5] Severe injuries are not an exceptional circumstance. In a 1965 judgment, Lord Denning M.R. noted that civil trials by jury had declined in England to about two percent of cases tried.[6]

A 1975 report of the Manitoba Law Reform Commission noted that there were only four civil jury trials in the province during the period from 1944 to 1956, and that there were no civil jury trials in the province during the period from 1957 to 1975.[7]

The Manitoba experience was noted in the Ontario Law Reform Commission's 1973 *Report on Administration of Ontario Courts*.[8] The Commission also noted that, in Alberta and Saskatchewan, the number of civil jury trials was negligible; in British Columbia and Newfoundland, fewer than ten percent of civil cases were tried by a jury; in Nova Scotia, civil juries were employed in not more than five percent of the cases in the Supreme Court, and infrequently in the County Courts; in New Brunswick, juries in civil cases were extremely rare; and in Prince Edward Island, there had not been a civil jury trial in five years.[9]

In 1979, the Law Reform Commission of Saskatchewan noted that civil jury trials were rare in Saskatchewan, there being three civil jury trials in 1976, and five civil jury trials in 1977.[10] Bouck J. of the British Columbia Supreme Court noted, in a 1981 article,[11] that fewer than three percent of all civil cases in that

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[5] *Ward v. James*, [1966] 1 Q.B. 273 (C.A.); *Sims v. William Howard & Sons Ltd.*, [1964] 2 Q.B. 409 (C.A.); and *Hennell v. Ranaboldo*, [1963] 3 All E.R. 684 (C.A.).

[6] *Ward v. James*, *supra*, note 5, at 368.

[7] Manitoba Law Reform Commission, *Report on the Administration of Justice in Manitoba Part II—A Review of the Jury System* (1975), at 37.

[8] Ontario Law Reform Commission, *Report on Administration of Ontario Courts* (1973), Part I, at 333.

[9] *Ibid.*, at 331-34.

[10] Law Reform Commission of Saskatchewan, *Tentative Proposals for Reform of the Jury Act* (1979), at 36.

[11] Bouck, "The Civil Jury Trial in British Columbia" (1981), 39 Advocate 105.

province are tried with a jury. In a 1993 discussion paper, the Law Reform Commission of Nova Scotia noted that, in that province, in many districts there were no jury trials and that typically the larger districts had only one or two civil jury trials annually.[12]

(b) UNITED STATES

Jury trials are used considerably more often in the United States than they are in either Canada or Britain. Annually, civil jury trials terminate approximately 50,000 claims in the United States.[13] This no doubt reflects the fact that the right to a civil jury trial is entrenched in the Seventh Amendment to the United States Constitution and by similar provisions in most state constitutions.

Given the importance of jury trials in the United States, in both criminal and civil proceedings, the role and performance of juries has been the subject of considerable debate, investigation, analysis, and commentary by American attorneys, judges, court administrators, and academics. In the United States, the use of civil juries has been the subject of both vigorous criticism and defence for many years. The debate has revived recently as a result of a perceived crisis in the insurance industry, which is said to be caused, in part, by excessive jury awards. As a result, there is a large and growing body of American literature concerning civil juries, some of which is considered below.

3. JURY USER FEES

Unlike Ontario, most jurisdictions in Canada provide for some form of fee to be paid by the party seeking a jury, in order to offset the cost to the public of the jury and the sheriff's officers. In Alberta, for example, the *Jury Act* provides that the party seeking a jury shall deposit with the clerk of the court "a sum of money that the clerk considers sufficient to pay the expenses of conducting the trial by jury".[14] In practice, this ordinarily results in approximately $1,000 or $2,000 having to be paid into court before the commencement of a civil jury trial.[15]

Similarly, the Saskatchewan Act requires that the party requesting a jury "deposit with the local registrar in advance of the trial any sum that the local

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12 Law Reform Commission of Nova Scotia, *A Discussion Paper: Juries in Nova Scotia* (1993), at 19.

13 The statistics are derived from Galanter, "The Regulatory Function of the Civil Jury", in Litan (ed.), *Verdict*[:] *Assessing the Civil Jury System* (1993) 61, at 63.

14 *Supra,* note 1, s. 17(1).

15 This practice was reported to the Commission by court officials in Calgary.

registrar considers sufficient for the fees and expenses of the jury for the estimated length of the trial".[16] The policy in Saskatchewan, therefore, is to estimate in advance the full additional cost of the jury trial, to the extent that it can be calculated. The provision in the Saskatchewan legislation with respect to costs is unique. With certain limited exceptions,[17] the Saskatchewan Act prohibits the successful party from recovering the cost of the jury.[18] The legislation in most provinces, however, allows the successful party, who requested a jury, to recover the amount of the jury fee in costs. Provinces having such legislation include Alberta,[19] British Columbia,[20] and Newfoundland,[21] as well as the Yukon Territory.[22]

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16 *The Jury Act, 1981, supra,* note 1, s. 16(2)(a).

17 Section 16(3) of *The Jury Act, 1981, ibid.,* provides that the trial judge may make an order regarding the cost of the jury in an action for libel, slander, seduction, malicious arrest, malicious prosecution, false imprisonment, or in respect of personal injury or death where the award exceeds $10,000.

18 *The Jury Act, 1981, ibid.,* s. 16(2)(b).

19 *Jury Act, supra,* note 1, s. 17(2).

20 *Jury Act, supra,* note 1, s. 15.

21 *Jury Act, 1991, supra,* note 1, s. 21(3).

22 *Jury Act,* R.S.Y. 1986, c. 97, s. 3(3).

CHAPTER 4

THE ARGUMENTS FOR AND AGAINST RETAINING THE CIVIL JURY

1. INTRODUCTION

In the *Consultation Paper on the Use of Jury Trials in Civil Cases,*[1] the Commission presented a number of arguments both for and against the retention of civil·jury trials. In this chapter, we review those arguments briefly.

As we noted in the consultation paper,[2] difficulties arise in evaluating the arguments, since many of the arguments are difficult to test empirically, or involve competing values that are irreconcilable. A further difficulty in assessing the arguments arises from the fact that there is no agreement about the criteria that should be used to measure the performance or contribution of juries or judges. It would appear, therefore, that the views of both advocates and opponents of the civil jury are informed, at least in part, by their own moral and political values.

2. ARGUMENTS FOR THE RETENTION OF CIVIL JURIES

(a) THE SAFEGUARD AGAINST ABUSE OF POWER ARGUMENT

At the heart of the argument in favour of the civil jury is the view that jury trials protect litigants from corruption, systemic bias, and abuses of executive, legislative, or judicial power. The jury is the community's mechanism for involvement in the administration of justice. It allows ordinary citizens the opportunity to check the improper exercise of public authority. This argument is particularly persuasive in the context of criminal proceedings, in which the contest is between the state and an individual. In civil cases, the argument might have force in the context of claims by or against public authorities. However, as

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1 Ontario Law Reform Commission, *Consultation Paper on the Use of Jury Trials in Civil Cases* (1994).

2 *Ibid.*, at 14-15.

we discussed above,[3] a number of statutes preclude juries in actions against federal, provincial, and municipal governments. These provisions undermine the argument that the civil jury provides protection against governmental or judicial abuse of power or corruption. Nevertheless, the ability of the jury to scrutinize the conduct of public authorities remains a powerful justification for the jury as a democratic instrument, and an argument for removing the barriers to its availability in actions involving the government.

A related view is that there might be cases in which a jury is sought because a particular judge is perceived to be biased or to abuse his or her power. However, there is little evidence to suggest that litigants generally request juries as a result of a concern about judicial impartiality or incompetence. The research and consultation conducted in connection with this report does suggests that some parties request juries as a result of a concern about the anticipated views or predispositions of particular judges. A number of lawyers advised the Commission that they request juries as a means of avoiding judges who, they feel, for one reason or another, would not give them a good hearing.[4] While this might not be an instance of institutional "abuse of power", it indicates nevertheless that some parties select juries out of a concern about how some judges might decide cases or conduct hearings.

The old adage that "justice must not only be done, but must be seen to be done" is still important today, and is an argument in favour of a broad right of access to the civil jury.[5]

(b) THE DUE PROCESS, COMMUNITY STANDARDS, AND LAW REFORM ARGUMENT

Supporters of jury trials argue that juries maintain the integrity of the administration of justice, allow the law to respond to the unique nature of individual cases, and reflect contemporary community standards about proper conduct and adequate remedies.

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[3] *Supra,* ch. 2, sec. 2

[4] Examples of the extensive American literature by members of the bench or senior judicial officials in support of the jury on this basis include the following: Rubin, "The Jury System: An Unbelievable Success" (1992), 18 Ohio N.U.L. Rev. 743; Feikens, "The Civil Jury—An Endangered Species" (1987), 20 J.L. Ref. 789; and Culley, "In Defense of Civil Juries" (1983), 35 Me. L. Rev. 17. See, also, Silverman, "Judicial Bias" (1990-91), 33 Crim. L.Q. 486.

[5] Many respondents to our survey of former civil jurors stated that they would prefer their matters to be heard by a jury. See *infra,* ch. 7, sec. 3.

A jury is composed of laypeople, selected randomly from the community, who, in theory, provide the court with a cross-section of societal views. Ordinarily, the decision of a jury will not be overruled by an appeal court. It has been held that a jury verdict will not be set aside unless it is so plainly unreasonable and unjust as to satisfy the appeal court that no jury reviewing the evidence as a whole and acting judicially could have reached the verdict.[6] A jury is able to reach a decision in a particular case without the institutional pressures faced by a judge. Judges are professional adjudicators who must give reasons for their decisions, and deal with the authority of binding precedent, the implications of the decision on future development of the law, and the greater willingness of an appeal court to review and reverse their decisions. Because a jury verdict is a group decision, arguably it is less likely to be idiosyncratic, or reflective of individual standards; rather, the randomly selected group's decision will be infused with current community values about what is reasonable conduct or what is a reasonable remedy.[7]

The community standards argument also notes that a jury verdict can revitalize and reform the law, as well as preserve due process in the administration of justice. An American commentator advancing this argument stated as follows:[8]

> [T]he jury helps retain the salience of the substantive morality embodied in the law—and helps align that morality with the emergent moral sense of the community or communities. In a system in which issues of culpability are typically effaced in settlement and routine processing, it is a good thing that at the end of the day there is a recourse to a forum that can respond to the particulars in terms of moral conviction undiluted by the constraints of institutional priorities or career concerns.

Supporters of the jury have also considered the kinds of action that are most appropriate for the community involvement of the jury. Defamation actions, which involve injury to one's reputation in the community, and false imprisonment and false arrest actions, are the examples typically given of cases that are most appropriately put before a jury. It is interesting to note, however, that there is no consensus on this list, even among advocates of the jury. The

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6 *McCannell v. McLean,* [1937] S.C.R. 341, and *Graham v. Hodgkinson* (1983), 40 O.R. (2d) 697 (C.A.).

7 Although the question of jury selection and composition is beyond the scope of this report, it should be noted that there has been a debate for some time about whether or not the jury does provide a genuine representation of the community, because the rules of jury selection, particularly those about peremptory challenges and the size of the jury, may disturb the random sampling.

8 Galanter, "The Regulatory Function of the Civil Jury", in Litan (ed.), *Verdict*[:] *Assessing the Civil Jury System* (1993) 61, at 89-90.

justification given for the above types of action is that they concern security of the person, or are instances in which the values, attitudes, or priorities of the community are themselves predominant issues in the case.

The proposition that certain civil cases are appropriate for a jury and that others are not was advocated by Lord Devlin, who was an admirer of the virtues of trial by jury. This proposition, in his view, explained and justified the decline of civil juries in England. Using the context of a civil case about carelessness, Lord Devlin stated:[9]

> In a case which was unique I should say unhesitatingly that a question of carelessness was better settled by a jury than by any other tribunal. Where there is no precedent to act as a guide, a common opinion is better than a single one. But cases that come up for trial rarely are unique.... Whenever cases about carelessness belong to a type, it is inevitable that there should also grow up a typical standard of care; it is not something that can be put into a formula which the jury can be told to apply; it depends upon a knowledge of the sort of approach that is generally made to cases of the type...where a case belongs to a type, it is an informed mind that is needed rather than a fresh one.

Lord Devlin accepted that jury verdicts are inherently inconsistent and suggested the factor of predictability as a measure for determining what sort of case was appropriate or inappropriate for a jury. He stated:[10]

> [S]o you will find that in modern times, the mode of trial is allowed to depend upon the importance of [predictability] in relation to the type of case that is being tried. When, for example, a man is on trial for his liberty, predictability is quite unimportant. What is then wanted is a decision on the merits that will after the event satisfy the public that justice as the ordinary man understands it has been done. Likewise, when a man's honour or reputation is at stake.... In any case in which there is going to be hard swearing on both sides, the result is unpredictable anyway until the witnesses have been heard and compared. Cases which have one or more of these characteristics will be probably either criminal or, if civil, will fall into one of the categories in which trial by jury is given as of right.[11] If the case is of a common type in which there is no hot dispute on the facts—for example, the ordinary accident case on the roads or in the factories; there is often an acute conflict on certain parts of the evidence but rarely wholesale perjury—a jury is not normally allowed, unless the case has some exceptional feature; otherwise, if a jury were allowed in one, it would have to be allowed in all.

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9 Lord Devlin, *Trial by Jury* (rev. ed., 1966), at 142-43.

10 *Ibid.*, at 157-58.

11 The reference here is to libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, and fraud.

Lord Devlin concluded that, while juries are useful instruments of justice, the cases for which they are suited are rare. Advocates of a more expansive role for the civil jury argue that cases cannot be categorized neatly into common and uncommon types. The advantage of the jury, in their view, is that juries allow each case to be heard afresh. This insures that no case will be typed as "common", and thereby guarantees that cases will not receive "assembly line justice". This issue—whether there are particular types of case that are appropriate for civil juries—is one on which opinion is divided. Moreover, among those who take the view that a division can be made between cases that are appropriate for a jury and cases that are not, there appears to be little consensus as to where the division occurs.

(c) THE CATALYST ARGUMENT

Advocates of the civil jury argue that cases that are scheduled to be heard before a jury are more likely to settle. In an effort to verify this thesis, the Commission undertook a detailed comparative study of jury and non-jury trials, which strongly suggests that matters scheduled to be heard before a jury are indeed more likely to settle, and are more likely to settle more quickly.[12] The ability of the jury to promote settlements would appear to be a compelling argument in its favour. It should be noted, however, that, during the Commission's consultation process, a number of lawyers and judges expressed the view that the effect of the jury on settlement rates is likely a function of the jury's perceived unpredictability. If it should be determined that litigants settle in order to guard against the unpredictability of the jury, this might constitute an argument against the jury. The issue of the perceived unpredictability of the jury is discussed below.[13]

(d) THE COMPETENCE ARGUMENT (FOR JURIES)

Supporters of civil jury trials argue that, as a matter of dispensing justice, the quality of jury verdicts is better than that of judgments reached in non-jury trials. This argument relies on the institutional characteristics of the jury, particularly the fact that jury decisions are group decisions. This characteristic is particularly important for those who argue for the retention of civil juries, because they refer to psychological studies that show that groups perform certain intellectual tasks, like finding credibility and assessing damages, better than individuals.[14]

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[12] This study is discussed *infra*, ch. 6.

[13] *Infra*, this ch., sec. 3(c).

[14] See, for example, Joiner, *Civil Justice and the Jury* (1962), at 25-35.

An immediate difficulty with this argument is that it assumes that there is some measure for competence. Unfortunately, the accuracy of a verdict or judgment cannot be a criterion, since, if the correct result were easily known, there would not likely be a dispute to be resolved. Thus, the competence of juries has been measured historically by studies that compare jury results with the results that judges say they would have reached in the same case, and by archival investigations that compare reported judgments and verdicts.[15] These studies indicate that juries usually respond as judges would. The University of Chicago Jury Project, the seminal study by Kalven and Zeisel, indicated that judges agreed with jury verdicts approximately eighty percent of the time,[16] and that, on average, jury awards tended to be higher than judge awards.[17] Recent anecdotal evidence in Ontario indicates, however, that jury awards in personal injury cases tend to be lower than judge awards. The eighty percent congruence between judge and jury, and the inherent inability of determining which mode of trial would yield the "correct" result for the balance of the cases, suggests that judges and juries are equally competent or, at least, that it is difficult to disprove the thesis that they are so.

(e) The Confidence in Fair Treatment Argument

The supporters of civil jury trials argue that the judgment of one's peers is more tolerable than a judgment from a judge alone because many citizens have greater confidence in the fairness of their peers than they do in the fairness of judges. On the other hand, it might be argued that some disappointed litigants may take greater comfort from the decision of a judge, since detailed reasons for judgment are provided, and it is subject to review by an appeal court.

Responses to the Commission's survey of former jurors, discussed below,[18] suggest that there might be more merit to this argument than was first thought. The responses to the survey suggest that many citizens, after serving as jurors, would prefer trial by a jury of their peers to trial by judge alone. While there might be a number of explanations for these responses, the most obvious explanation is a belief that their peers would provide them with a better hearing or decision than a judge. Moreover, as noted above, our consultations with the profession suggest that, in some instances, counsel do request juries out of a concern for fair treatment.

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15 Kalven, "The Dignity of the Civil Jury" (1964), 50 Va. L. Rev. 1055.

16 Kalven and Zeisel, *The American Jury* (1966), at 58.

17 Kalven, *supra,* note 15, at 1065-66.

18 *Infra,* ch. 7, sec. 3(b).

(f) The Participation Argument

The supporters of civil jury trials argue that, to the benefit of society, jury duty provides ordinary citizens with an opportunity to participate in the administration of their society's justice system. As one commentator has observed, this argument has rarely been challenged:[19]

> [I]n the civil jury literature over the years, the educative function of the civil jury has come to trump effectively any jury skepticism, perhaps because the postulated product of jury experience—increased civil responsibility—can be thought to be of nearly infinite value in a democracy. Whatever the reason, there has been little effort over the years either to measure with any precision how jury service alters commitment to democracy, or to compare jury service to other civic experiences or to other educational mechanisms for improving citizenship.

In addition to noting the absence of any studies to prove the participation argument, Professor Priest points out that, because of population growth, very few citizens are afforded an education about democracy through jury duty. For example, a modern Chicago citizen faces a probability of jury duty once every 260.2 years, while in the last century, a Chicago citizen would have been called for jury duty once every three or four years.[20]

Professor Priest also points out that it is not clear that all disputes provide a similar educational experience in the civic virtues.[21] His analysis of all civil jury trials in Cook County, Illinois (16,984 cases) for the period from 1959 to 1979 reveals that 63.17 percent of the cases involved motor vehicle accidents, 27.45 percent involved other tort claims, and only 4.9 percent involved governments as defendants or as plaintiffs. Sorted differently, his analysis reveals that 52.91 percent of the cases were about routine injuries, no more serious than a fracture. By comparison, all criminal cases involve state power and the liberty and reputation of the accused citizen, and it is fair to argue that participation in the adjudication of a criminal proceeding is a more valuable educational experience in civics than participation in the adjudication of a civil case. This argument applies with greater force to Ontario where civil actions against the government are not tried by a jury and where an even higher percentage of civil jury trials involve motor vehicle accidents.

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19 Priest, "The Role of the Civil Jury in a System of Private Litigation", [1990] U. Chi. Legal Forum 161, at 187.

20 *Ibid.*, at 187-88.

21 *Ibid.*, at 190.

In Ontario, the statistics of the Ministry of the Attorney General indicate that fewer than 4,200 citizens a year would have the benefit of an education in civics from jury duty in civil cases, and this education, with very few exceptions, would be in a case involving a motor vehicle accident.[22] Apart from the rare cases of malicious arrest, malicious prosecution, and wrongful imprisonment, which would involve a police officer, none of the cases would involve a governmental element.

These figures, and the nature of the cases decided in Ontario, suggest that civil jury trials make an extremely modest contribution to improved citizenship in the province. This contribution, alone, would not appear to justify the retention of civil jury trials.

(g) THE BURDEN OF PROOF ARGUMENT

Supporters of the civil jury argue that, given its long history and tradition as a valued social institution, the civil jury should not be abolished without substantial evidence to justify such action. Thus, supporters argue, the burden of proof is on those who seek to abolish the jury.

There is a further, more contemporary, argument that would suggest that the burden of proof should be placed on those who seek to abolish the jury. At present, populist values—the sense that citizens should have the opportunity to participate directly in governance—are very strong. The authority and legitimacy of institutions and their leaders are everywhere under attack as being elitist. Courts and judges, while retaining greater legitimacy than other institutions, are not immune from such criticisms. As a result, one might hesitate before abolishing one of the instruments through which individuals can participate directly in the judicial process—even if the actual number of citizens who do so is relatively small. The civil jury thus has a certain symbolic value, which might provide a further rationale to suggest that the burden of proof should be placed on opponents of the jury.

3. ARGUMENTS AGAINST THE RETENTION OF CIVIL JURIES

(a) THE COST-BENEFIT ARGUMENT

In the consultation paper, the Commission found the cost-benefit argument to be the most persuasive argument advanced by those seeking the abolition of the civil jury. This argument assumes that jury trials are more lengthy and more

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[22] Our own study suggests that the number would actually be much smaller than 4,200. See *infra*, ch. 6.

expensive than non-jury trials. It further assumes that trials by judge alone deal adequately with disputes, rendering the jury an unnecessary added expense. However, the cost study conducted by the Commission in connection with this report, discussed below,[23] demonstrates that jury trials do not take as long, and are not as costly, as is often suggested.

A study undertaken by the Ministry's Court Reform Task Force, which conducted a survey of both civil and criminal jury trials for the period from July 1, 1990 to June 30, 1991, suggested that the total cost of civil jurors' fees and expenses for the period was between $250,000 and $350,000.[24] The task force did not examine the other costs associated with civil jury trials, for example, the additional time of court clerks, sheriffs, other court staff, and judges. The Commission's estimate of these other costs is provided below.[25]

The cost-benefit argument is persuasive if the underlying assumption—that is, that jury trials are more lengthy and more expensive than non-jury trials—is correct. However, the Commission's empirical studies did not demonstrate conclusively that civil jury trials cost the government more than trials by judge alone. Accordingly, there would appear to be reason to doubt the correctness of the underlying assumption. The cost-benefit argument, therefore, does not appear to be as persuasive as was suggested in the consultation paper.

(b) THE TACTICAL DEVICE ARGUMENT

Many critics of the civil jury assert, in essence, that the jury has become a tactical device that is often misused by defendants and, to a lesser extent, by plaintiffs. Both the *Royal Commission Inquiry into Civil Rights,*[26] and the Commission's 1973 *Report on Administration of Ontario Courts,*[27] noted this phenomenon and offered it as a reason for recommending that the availability of jury trials be limited in civil cases.

Both anecdotal and some empirical evidence appear to suggest that individual litigants who lack confidence in the merits of their case request a jury because

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[23] *Ibid.*

[24] As we discuss *infra,* ch. 6, sec. 1(b), there is some question about the accuracy of these figures.

[25] See *infra,* ch. 6, sec. 2.

[26] Ontario, *Royal Commission Inquiry into Civil Rights* (1968), Report No. 1, Vol. 2 (the "McRuer Report"), at 860.

[27] Ontario Law Reform Commission, *Report on Administration of Ontario Courts* (1973), Part I, at 336.

they hope that the relative unpredictability of the jury will promote a settlement. Similarly, parties with weak cases may hope to make a sentimental appeal to the sympathy of the jurors.

A frequent complaint made about the civil jury is that it is utilized primarily by institutional defendants, such as insurance companies, to obtain a tactical advantage. Insurance companies, it is alleged, request juries because their lawyers have considerable experience with this mode of trial, whereas the lawyers for individual plaintiffs often lack comparable experience. This difference in experience gives a decided advantage to such defendants. In addition to the advantage in experience, it has been suggested that lawyers for the defendants in motor vehicle cases request juries because jury awards in Ontario apparently have become lower than awards by judges for such cases. Numerous reports of these tactics were received by the Commission during the consultation process that followed the publication of the consultation paper. The responses received in the consultation process will be discussed below.[28]

The tendency of juries to make smaller awards of damages, if true, would be a persuasive argument against juries if it appeared that they were arriving at these lower figures in the absence of supporting evidence. However, we do not have any data to show that juries are making awards outside the range proposed by the experts at trial. Accordingly, it is difficult to conclude that juries are assessing damages improperly. Moreover, it should be noted that, merely because a jury makes an award of damages that is smaller than an award made by a judge, it does not mean that the decision of the jury is less correct than that of a judge.

Assuming, however, that Ontario juries are more conservative in awarding damages, as the anecdotal evidence suggests, the question arises why this is so. A number of views were expressed on this issue in our consultation process. One reason often given to explain the restraint of juries is the inability of jurors to appreciate fully the expert evidence and complicated calculations associated with claims for future loss. Another explanation given for the conservatism of juries is the jurors' self-interest in keeping insurance premiums low. Others suggested that juries were more willing than judges to take an appropriately skeptical view of the testimony of plaintiffs. However, explanations such as these are not accompanied by any data. Since jurors in Ontario cannot be questioned about their deliberations, it is difficult to assess properly the reasons why juries are less generous in their awards. In the absence of substantial evidence, this reported phenomenon does not, in our view, provide an adequate basis for a persuasive argument against civil juries.

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[28] See *infra*, ch. 5.

While there is evidence to suggest that some lawyers request a jury trial in order to obtain a tactical advantage, it is unclear whether this constitutes a valid argument against maintaining the jury. As we noted in the consultation paper,[29] advantages and disadvantages change over time. Moreover, it might be inappropriate to single out the use of the jury to obtain a tactical advantage as being improper in an adversarial system that involves tactics at each step. As we concluded in the consultation paper,[30] the tactical device argument is unpersuasive.

(c) The Competence Argument (Against Juries)

Opponents of the civil jury often allege that the quality of jury verdicts is inferior or less reliable than the judgments of judges sitting alone. In addition, it is argued that the relative unpredictability of jury verdicts is detrimental to the administration of justice.

Data such as that provided by the University of Chicago Jury Project,[31] demonstrates that juries appear to be as competent as judges. However, while the alleged incompetence of juries may be an unconvincing argument, the issue of their unpredictability is more difficult. Submissions received by the Commission from lawyers during the consultation process indicated that many believe juries to be less predictable than judges. According to a number of respondents to the consultation paper, this perception—that juries are more unpredictable—accounts for the higher rate of settlement of matters scheduled for jury trials. The extent to which this might be true has yet to be quantified. Other lawyers, however, suggested that judicial opinion is also unpredictable. They add that any case that truly is predictable would have settled before trial. According to these respondents, the outcome of any case that proceeds to be adjudicated is unpredictable by definition.

In light of the unanswered questions surrounding the issue of the unpredictability of juries and the data that affirms their competency, the argument that juries are incompetent appears to be unconvincing.

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[29] *Supra*, note 1, at 30.

[30] *Ibid.*

[31] *Supra*, note 17.

4. EVALUATING THE ARGUMENTS

The arguments for and against the retention of the civil jury, outlined above, include many of the arguments ordinarily advanced by advocates or critics of the jury. As we have already noted,[32] it is difficult to assess the relative merits of these arguments and, accordingly, we have concluded that they do not provide an entirely satisfactory basis for determining the proper role for the civil jury.

Respondents in the consultation process suggested that more empirical data were required before a properly informed decision could be made about the civil jury. As a result of the short period of time that was available for the production of the consultation paper, there was insufficient time to conduct such studies or to canvass interested parties. Since that time, however, the Commission has had the opportunity to conduct a number of studies into the relative length of jury and non-jury trials and the added expense associated with jury trials. We also had an opportunity to canvass the opinions of judges and jurors. Surveys of litigation lawyers also were prepared for our consideration by the Advocates' Society and the Canadian Bar Association—Ontario. These studies, which are discussed below,[33] provide a more accurate and contemporary view of the civil jury in Ontario. Accordingly, they provide a sounder basis for policy formulation than was available at the time of the preparation of the consultation paper.

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32 *Supra*, this ch., sec. 1.

33 *Infra*, chs. 5-7.

CHAPTER 5

THE CONSULTATION PROCESS

1. CONSULTATION WITH THE BAR AND INTERESTED PARTIES

In late 1993, the Deputy Attorney General asked the Commission to undertake a study of the current use of the civil jury in Ontario. As the Commission was asked for an early response, we were not able to conduct original research in the preparation of our consultation paper.[1] Consequently, it was based primarily on existing data and secondary literature. The consultation paper concluded with the following tentative recommendation for the future of civil juries:[2]

> [T]he current presumption in Ontario law favouring the availability of juries in civil cases should be reversed, and...juries should be available, upon judicial order, only where the predominant issues in the action concern the values, attitudes or priorities of the community and the ends of justice will be best served if the findings of fact or assessment of damages are made by a jury.

After its publication, in March 1994, the consultation paper was circulated widely. Copies were sent to provincial political leaders, senior officials within the Ministry of the Attorney General, judges of the Ontario Court of Justice (General Division), county and district law associations, and a variety of community groups and professional organizations. The aim in circulating the consultation paper was to stimulate a discussion in the community about the value of the civil jury. Moreover, by consulting with those who would be most affected by the Commission's tentative recommendation, the Commission sought to obtain first-hand accounts of experiences with juries in Ontario.

By the conclusion of the consultation process, the Commission had received a number of written responses, as well as numerous informal responses. The

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1 Ontario Law Reform Commission, *Consultation Paper on the Use of Jury Trials in Civil Cases* (1994).

2 *Ibid.*, at 33.

formal submissions were received from a variety of sources, including lawyers; judges, both active and retired; and representatives of industries who felt that they had a stake in the jury's survival.

Of the written submissions, only two approved of the Commission's tentative recommendation. Most responses were critical of the proposed restriction on the availability of the civil jury. The most common criticisms in these responses were that the consultation paper did not provide enough empirical data on the added cost of the jury, and that citizens have a right to be tried before their peers.

One of the submissions, received from a retired judge, criticized the consultation paper for being too philosophical, at the expense of providing meaningful practical discussion. The same respondent also warned that, as a practical matter, the Commission's tentative proposal—that leave of the court should be required before a jury is granted—would result in the elimination of the civil jury in Ontario. This opinion was also expressed by another retired judge, who stated that the reverse onus, suggested by the Commission, would be tantamount to the abolition of the jury in civil cases. The sentiment underlying both of these submissions seems to be that judges would not be inclined to grant a trial by jury, believing that they could perform the job adequately on their own.

Criticisms of the tentative recommendation were received from active judges as well. A current member of the Ontario Court of Justice (General Division) expressed the view that civil trial by jury is an important civil right that should not be tampered with. The same respondent went on to note that leaving the decision to have a jury with the parties, who are best able to judge their own needs, is the preferred policy, and is one that is consistent with our adversarial system. Another judge of the same court expressed the view that juries should continue to be available in cases involving contested wills.

Of the submissions received by the Commission during the consultation process the most thorough and representative came from the Canadian Bar Association—Ontario (the "CBA—O") and the Advocates' Society, both of which are province-wide legal professional associations. Both groups conducted surveys of their members before drafting their positions to the consultation paper. The CBA—O also convened a program entitled "The Future of Civil Juries", which provided an opportunity for participants to discuss the issues raised in the consultation paper and the Commission's tentative proposal.

Perhaps the most interesting issues addressed during these various consultations concerned the reasons that parties request juries in civil cases. The most common reasons given by lawyers for requesting juries were the following:

1. *Forum "Shopping"* Many of the lawyers with whom the Commission consulted expressed the opinion that the request for a jury provides a safeguard against the possibility of having to go to trial before a judge who is viewed as being

unsympathetic or otherwise unsuitable for the matter at hand. As the trial date approaches, and the identity of the trial judge becomes known, the jury can be dispensed with if the judge is viewed as being acceptable.

2. *Appearing in Unfamiliar Courts* A number of counsel stated that they might be uncomfortable when appearing in court in communities other than those in which they practise regularly. The jury provides them with the opportunity to have liability determined by citizens who are unconnected with another community's potentially insular legal community. As one lawyer observed, the presence of a jury imposes a certain discipline on the proceeding.

3. *Juries Give Smaller Awards* For at least thirty years, since the decision in *Grey v. Alanco,*[3] the tendency of Ontario juries to make smaller awards of damages than judges has been noted on numerous occasions. As a result of this tendency, juries are very popular with insurance companies and their lawyers when defending the interests of defendants. Indeed, the Commission received a number of impassioned pleas from members of the defence bar to maintain the jury.

4. *Juries Intimidate Inexperienced Counsel* It appears to be widely believed in the legal profession that the request for a jury is often employed as a tactic by experienced counsel (usually the defence bar in personal injury cases) to intimidate younger and less experienced counsel. This tactic, as we noted above,[4] was one of the reasons given by the Commission in 1973 for recommending that civil juries should be abolished except in respect of specific types of action.

The above reasons were reiterated to the Commission by a number of respondents during the consultation process, and confirmed by surveys of the profession. Although the frequency with which particular motives inform the request for a jury has not been studied, we do not doubt that juries are often selected for the above reasons.

The consultation process also revealed that it is the lawyer, as opposed to the client, who ordinarily makes the decision whether a jury will be requested. Moreover, it is often the case that the lawyer for one party requests a jury against the wishes of the lawyer for the other party.

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[3] [1965] 2 O.R. 144 (H.C.J.). In that case, at 151, Mr. Justice Haines stated that, in his experience, jury notices are served by insurers. He explained that "[t]he reasons are not hard to find. Juries unacquainted with the value of these claims assess damages in an amount lower than a Judge, sometimes considerably lower."

[4] *Supra*, ch. 4, sec. 3(b).

The civil litigation section of the CBA—O submitted a position paper to the Commission on behalf of the majority of the section.[5] The position paper rejected the Commission's tentative recommendation on several grounds, including the fact that, historically, the right to a civil jury was a substantive right. In addition, the paper noted that the participation of members of the community in the judicial process is of great importance to the legal system. The CBA—O paper also stated, as did many of the other respondents, that the Commission's consultation paper contained little analysis of the Ontario experience.

The CBA—O paper also provided a detailed analysis of the arguments presented by the Commission in the consultation paper for and against the civil jury. The CBA—O's response placed some emphasis on its view that the significance of the civil jury rests, to some extent, on the fact that the perception of the litigants that justice was done is important, and its recognition of the reality that members of the bench tend to come from a privileged segment of society.

The submission of the Advocates' Society came to a similar conclusion, and included many of the same observations contained in the CBA—O paper. In preparing for its submission, the Society sent a questionnaire to each of its 1,768 members. Of the respondents, seventy percent were in favour of retaining the civil jury system, while thirty percent were in favour of abolition, or significant modification of the availability of the jury.

The submission of the Advocates' Society, like so many other responses received during the consultation process, argued that juries protect democracy and, to that end, urged that the scope of the jury be expanded to allow juries in actions against governmental bodies. The Society also responded to the view that the purported unpredictability of the jury is a difficulty, suggesting that unpredictability creates an incentive to settle. This incentive, the Society argues, is a principled approach to resolving disputes because unpredictability permeates all civil actions that proceed to trial.

Finally, the Advocates' Society contributed to the cost-benefit debate, arguing that any comparison of trial lengths should compare the "gross number" of jury and non-jury cases, rather than comparing individual cases. The argument focuses on the total populations of all jury and non-jury actions, so that appropriate account can be taken of the rates of settlement. This method of

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[5] Approximately 2/3 of the civil litigation section was in favour of retaining the jury. Interestingly, this percentage was consistent for both plaintiff and defence counsel. The consistency in approval rates for plaintiff and defence counsel is surprising given the normal assumption that it is primarily defence lawyers who utilize the jury.

analysis proved to be productive in the Commission's own time study, discussed below.[6]

The fact that the majority of responses received by the Commission during the consultation process were critical of the tentative recommendation is likely a result, at least in part, of the tendency of those who approve to remain silent. Nevertheless, given that the responses of the CBA—O and the Advocates' Society, which together represent a substantial number of members of the profession, were critical of the tentative recommendation, the Commission acknowledged that additional empirical research was desirable.

By virtue of the consultation process, the Commission was able to determine that there was enough interest in a time and cost study to justify the expense of such an undertaking. Following the publication of the consultation paper, the Ministry's sense of urgency with respect to this issue diminished as a result of certain changes in the legislative schedule. The additional time available to the Commission was utilized to obtain more detailed information concerning the Ontario experience, by conducting the following studies: an analysis of the relative length of jury and non-jury civil trials; the additional costs associated with the civil jury; a survey of Regional Senior Justices of the Ontario Court of Justice (General Division); and a survey of past civil jurors.

2. CONSULTATION WITH THE REGIONAL SENIOR JUSTICES

In order to obtain a more comprehensive view of the effect of the civil jury on the administration of justice, a survey was undertaken of the Regional Senior Justices of the Ontario Court of Justice (General Division). The questionnaire included questions on the types of cases that are more appropriate for civil juries, as well as the effect that juries have on judges' work loads.

After consulting with a number of senior judges, it was decided that the Regional Senior Justices would be invited to forward the questionnaire to any of the judges in their region who, in their view, might have insights to contribute to the survey. As a result, the Commission received a total of twenty-five questionnaires from General Division Judges, including responses from Regional Senior Justices in seven of the province's eight judicial regions.[7] The other eighteen responses came from General Division judges from across the province.

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6 *Infra*, ch. 6.

7 It should be noted that the questionnaire did not ask judges to identify themselves. Nevertheless, a large number of respondents chose to do so. Among those who identified themselves were 7 of the province's 8 Regional Senior Justices. Whether the eighth Regional Senior responded anonymously is not known.

(a) Length of Jury Trials and their Effect on Judicial Workload

The first question that the judges were asked was whether, in their experience, civil jury trials require more court time than trials before a judge alone and, if so, the amount of additional time that they require. Not surprisingly, all of the respondents observed that jury trials require additional time. While there was some divergence among the twenty-three responses that provided a numerical estimate, the average response was that civil jury trials take between one-half of a day and one full day longer.[8]

The judges were then asked to consider whether jury trials require more preparation time out of court than trials when they sit alone. This question was intended primarily to ask the judges to compare the time required to write a charge to the jury with the time required to write a reserved judgment. Approximately two-thirds of the responses stated that there was no significant difference in the amount of time required out of court to prepare for the two different modes of trial. Among these responses were those from several judges who were of the view that a charge to the jury might actually take slightly longer in a simple case. On the other hand, just fewer than one-third of the respondents were of the view that reserved judgments required more time to prepare.[9]

The judges were also asked to estimate how often they reserved judgment in civil cases, and the average amount of time that it took for them to prepare such judgments. Most of the twenty-one numerical estimates as to the frequency of reserved judgments provided in the responses were quite high, with the average response being approximately fifty-eight percent. With respect to the amount of time required to write reserve judgments, the answers understandably were quite varied, and often were accompanied by qualifications. Since no two cases are exactly alike, it is difficult to arrive at the "average" time that it takes to prepare written reasons for judgment. Nevertheless, the wide range of responses, which varied from a few hours to six months (with the majority of respondents stating that reserve judgments can, in some cases, take weeks or even months to complete), still indicate that litigants sometimes have to wait for a considerable time before receiving their judgment.

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8 While 1/2 to 1 full day longer was the average response, the estimates ranged from an additional 2 or 3 hours (from a judge who went to the trouble of breaking down the minutes required for each extra step in a jury trial, for example, the charge to the jury) to twice as long.

9 The time estimates given by these respondents ranged from slightly longer to considerably longer, with the average estimate being substantially longer.

In general, the judges expressed the view that, while jury trials take longer to complete and thereby require more judge time in the court room, they require less judge time out of the court room. On balance, however, in the minds of judges, jury trials still required more judge time. The only other observation that should be noted was that, although some judges were of the view that jury trials take longer and consume more judicial resources, they acknowledged that jury trials generally provide decisions to the parties more promptly than trials by a judge alone.

(b) The Jury's Effect on Civil Lists and Settlement Rates

As stated above, the initial objective of the survey was to ascertain the effect that juries have on the management of the courts' civil lists. The survey question concerning this issue was intended primarily for the Regional Senior Justices who, because of their administrative responsibilities, have the greatest familiarity with the lists in each region. The responses of the seven Regional Senior Justices who could be identified were almost evenly divided. Three judges expressed the opinion that juries slow down the list, two expressed the opinion that they speed it up through increased settlement, and two others were of the view that the jury has no appreciable effect. Among the comments received respecting this question, it is interesting to note that one judge expressed the view that the increased settlement rate associated with jury trials speeds matters up, while another judge was of the opinion that it posed a scheduling dilemma, which slows the list down.[10]

While there was clear disagreement on the effect of the jury on the civil lists, the same could not be said about its impact on settlements. Of the twenty-five responses received, all but three expressed the view that cases scheduled to be heard before a jury have a higher settlement rate than cases scheduled to be heard by a judge alone. In addition, most of the respondents who noted the higher settlement rate were of the opinion that it was at least in some sense attributable directly to the jury itself. The most common reasoning offered for this impact was the perceived unpredictability of the jury, which, it was suggested, might lead many parties to agree to settle.

In an effort to substantiate the hypothesis that jury matters are more likely to settle, one Regional Senior Justice's response included settlement data from that judge's region, which is one of the busiest in the province. According to the data

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[10] While the question about the jury's effect on the civil lists was intended for the Regional Senior Justices, some of the other 18 respondents also offered opinions. Of the other responses to this question, 4 judges expressed the view that the jury speeds the list up, another 4 said that it slows it down, and 2 other judges responded that it has no appreciable effect.

provided for that region, fifteen to eighteen percent of matters scheduled to be heard before a judge alone actually proceed to trial, whereas only three percent of cases scheduled to be heard before a jury actually proceed to trial. On the basis of these statistics, which show jury matters settling at an approximate rate of six to one, it would appear that the jury has a marked effect on settlements. A more detailed statistical analysis of the effect of the jury on settlement appears below.[11]

(c) Appropriate Cases for Juries

The judges were also asked for their views as to the kinds of cases that are heard most appropriately before juries, and those that are heard most appropriately before a judge alone.

With respect to the questions concerning the kinds of cases that are heard most appropriately before juries, opinions were divided. Approximately one-half of the judges were of the view that there is no class of case that is more appropriately heard before a jury. These responses might be taken as a statement by these judges that they can adjudicate matters as well as a jury. This would not be a surprising position for professional adjudicators to take. The other half of the respondents expressed the view that there are certain types of cases that are heard more appropriately before a jury. These respondents, moreover, generally agreed on the kinds of cases that would benefit from public involvement, most often referring to actions for libel, slander, false arrest, false imprisonment, and wrongful dismissal. A few respondents also stated that personal injury cases were more appropriately heard before a jury, while a single judge expressed the opinion that every type of civil case is best heard before a jury.

The responses received to the question concerning the kinds of cases that are heard most appropriately by a judge alone were relatively more consistent. Most respondents expressed the view that there are certain types of cases that are best heard by a judge alone. The kinds of cases that were most often cited were complex cases, such as commercial matters and malpractice cases, or any case involving considerable technical evidence. One judge also noted that cases involving modest sums of money ought to be heard by a judge alone, while another judge expressed the view that lengthy trials are best heard by judge alone. While there was more unanimity among the judges in respect to this question, there were still some responses at either extreme. For example, one judge was of the view that all civil cases should be heard by a judge alone, while another judge expressed confidence in the ability of jurors to deal with all types of issues.

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[11] *Infra*, ch. 6, sec. 1.

(d) Judicial Perceptions of the Jury

Although the questionnaire did not ask the judges directly if they were in favour of the continued existence of the civil jury, in some form, it did ask them to state their perceptions as to the advantages and disadvantages of the jury in civil cases. There was considerable agreement on this issue among the responses received from the Regional Senior Justices. In general, they indicated that the disadvantages of the jury include the fact that jury trials take longer than trials by a judge alone, and that jury verdicts are often unpredictable. With respect to the advantages, most respondents expressed the view that it was important for the public to be involved in the administration of civil justice. Only two of the responses seemed to express a conclusion as to the overall worth of the jury, those being responses from judges who were of the view that public involvement was “important”.

Of the other eighteen responses received, six expressed the view that the advantages of the jury outweigh its disadvantages. On the other hand, four respondents were of the view that the jury had no advantages, or that it should be abolished. Many of the comments contained in these responses mirrored those contained in the responses of the Regional Senior Justices. In addition, one judge observed that juries have difficulty assessing damages. In order to demonstrate the point, the judge included a comparison of his calculation of damages in a recent case, with those assessed by the jury. The jury’s total was substantially lower. On the other hand, two other judges were of the opinion that juries restrain the judicial tendency towards larger awards. Finally, two judges expressed concern that jurors were not compensated adequately and that an improvement of the facilities for jurors was needed.

(e) Summary

What began as a survey of the province’s Regional Senior Justices evolved into a modest survey of the judges of the Ontario Court of Justice (General Division). One of the insights obtained from the survey was that there is a perception among most judges that the jury induces settlement. The most common explanation given for this was the unpredictability of the jury, which induces the parties to be more receptive to settlement. This view was also reported to the Commission by numerous lawyers during the consultation process. The judges were also generally in agreement that complex cases are not appropriate for juries.

Another insight obtained from the survey was that judges reserve judgment in a great number of cases, and that this often results in the parties waiting for several weeks or months before receiving their judgment. Finally, of the respondents who expressed an opinion as to whether the civil jury should be

maintained, sixty percent were in favour of retaining the jury while forty percent were against retention.[12] It is interesting to note that opinion on this issue is divided among lawyers in approximately the same proportion. The wide difference of opinion among judges demonstrates that the jury is as controversial an issue for judges as it is for lawyers.

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12 For a description of 2 relatively recent surveys of American judges in which there was a "strong judicial endorsement of civil juries", see Galanter, "The Civil Jury as Regulator of the Litigation Process", [1990] U. Chi. Legal Forum 201, at 205.

CHAPTER 6

THE RELATIVE LENGTH OF CIVIL JURY TRIALS AND THE COST OF CIVIL JURIES

1. THE RELATIVE LENGTH OF CIVIL JURY TRIALS

The most frequent observation made during the consultation process, as we noted above,[1] was that there was a need for empirical research into the relative length and expense of civil jury trials, as compared to trials by judge alone. While it has been an accepted truth among many judges and lawyers that jury trials take longer and cost more than trials by judge alone, a number of respondents expressed the view that there was a need to go beyond intuitions and anecdotes.

The relative length of civil jury trials, as opposed to trials by judge alone, has rarely been studied in Ontario. The study of civil jury trial duration cited most often is the 1968 postscript to *The Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents*.[2] The figures in the Postscript to the Osgoode Hall Study reveal that the average time to conclude a jury trial was 2.4 days, as opposed to 1.9 days for a trial by a judge alone.[3] These figures were based on the measurement unit of tenths of a court day. Due to the age of the study, the Commission concluded that it would be desirable to conduct a new study.

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[1] *Supra*, ch. 5, sec. 1.

[2] The original study is Linden, *The Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents* (1965). The postscript, which contained the study of relative trial durations, is Linden and Sommers, "The Civil Jury in the Courts of Ontario: A Postscript to the Osgoode Hall Study" (1968), 6 Osgoode Hall L.J. 252 (hereinafter referred to as "Postscript to the Osgoode Hall Study").

[3] *Ibid.*, at 258.

The general purpose of the study conducted by the Commission was to determine whether civil jury trials take longer than trials by a judge alone. If jury trials were found to take longer than trials by a judge alone, and were thus more expensive, this might constitute an argument for restricting the availability of the civil jury. Of course, the time that it takes for legal proceedings to be completed can be measured differently depending on the stage in the process from which one is measuring. As a result, the time taken for trials can be divided into a number of categories, including: "total time", which is the time from the filing of a statement of claim to the final disposition of a matter; "pre-trial time", which is the time from the filing of a statement of claim until the start of trial; and "hearing time", which is the actual time spent by the court hearing a matter. The study examined all three of these measurements. At the outset, it is interesting to note that the various measurements of time have different significance for different parties. Thus, for example, while total time might be the most important consideration for litigants, taxpayers have a greater interest in hearing time, and the court expenditures associated with it.

In addition to studying the comparative lengths of civil jury and non-jury trials, the Commission collaborated with the Courts Administration division of the Ministry on a costing study of the civil jury. The purpose of the costing study was to estimate how much more jury trials cost to administer than trials by judge alone.

(a) RESEARCH DESIGN AND METHODOLOGY

The original basis for the study was statistics compiled by the Ministry of the Attorney General for the period from April 1, 1992 to March 31, 1993. According to those Ministry figures, 702 (or approximately twenty percent) of the 3,446 civil trials reported in 1992/93 involved a jury.[4] With these figures in mind, the study was designed to insure that a significant proportion of these 702 jury trials were sampled. Six courthouses were selected[5] from four of the eight judicial regions in the province. Table No. 1 sets out the original sample design.

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4 The figures were provided by the Courts Administration division of the Ministry of the Attorney General.

5 The courthouses selected were in Durham, York, Hamilton-Wentworth, Waterloo, Peel, and Toronto.

Table No. 1
Proposed Civil Jury Research Study Sample Design

Court	Jury	Non-Jury	Total
Durham	13	13 of 43	26
York	17	17 of 42	34
Hamilton-Wentworth	34	34 of 46	68
Waterloo	50 of 104	50 of 78	100
Peel	9	9 of 116	18
Toronto	75 of 183	75 of 663	150
TOTAL	198	198	396

The figures in Table No. 1 show that the study intended originally to analyze all of the jury trials in four of the courts, and a significant proportion of the jury trials in Waterloo and Toronto. The 198 jury trials set out in the sample design constituted more than one-quarter of all of the civil jury trials that were reported in the province during the 1992/93 year. As the table illustrates, these jury trials were to be compared to an equal number of similar non-jury trials at each courthouse.

The general purpose of the study was to compare the amount of time required to dispose of jury and non-jury matters. The comparison included the three measures of time noted above—total time, pre-trial time, and hearing time. Of particular note was the measurement of hearing time in minutes, through the review of courtroom minute books, which are logs kept by the registrars for each courtroom. These logs record how every minute of courtroom time is used, and thus permitted a high degree of precision.

(b) Data Collection

Very early in the process of collecting the data it became apparent that we would not be able to adhere to the original sample design, set out in Table No. 1. The Ministry statistics, on which that design was based, stated that there were 702 jury trials in 1992/93. Research conducted at the six selected sites, however, indicated that there were considerably fewer civil jury trials being conducted in the province than had been reported by the Ministry. The reason for the discrepancy between the Ministry figures and the data collected by the Commission was the manner in which many trial coordinators had recorded the existence of trials at their courts.

Discussions with trial coordinators indicated that most of them included in their trial statistics any case that had completed a pre-trial conference and had been listed for trial. One trial coordinator even included in the trial statistics at that courthouse matters that were settled during pre-trial proceedings. The time from pre-trial conference to trial varies from several weeks to several months,

depending on the region. Thus, it is quite possible that a case that was settled two months before it was scheduled to be tried was included as a trial in the Ministry statistics.

It should be noted that, for the purposes of the Commission's study, a trial was defined as any case in which an actual hearing was commenced and at least some evidence was heard. A matter was not included as a trial if the parties appeared in court to deal only with minutes of settlement.

Due to the varying criteria utilized by trial coordinators for recording trials, more trials were reported than had actually taken place. Table No. 2 below shows the actual number of jury trials at each of the sites, compared to the number of trials reported by the Ministry. The number of actual or "identified" trials represents only 43.3 percent of the Ministry total. The final sample used in the study differs from the actual number of jury trials because it was not possible to locate all the necessary documentation for every case.

Table No. 2
Number of Actual Jury Trials as Compared to Ministry Statistics

Region	Provincial Statistics	Identified Jury Trials	Final Sample
Toronto	183	100	95
Durham	13	9	3
York	17	5	5
Peel	9	13	12
Hamilton	34	19	19
Waterloo	104	10	6
TOTAL	360	156	140

As a result of this discrepancy in the statistics, the proposed sample design had to be modified. Table No. 3 shows the number of cases by region that were actually studied. The sample represents all of the jury trials for which data were available at each of the six courthouses, and probably represents approximately one-half of all jury trials in the province during the 1992/93 year.[6] In each region an effort was made to study a comparable number of similar non-jury cases, which were randomly selected. In Toronto, difficulties with the tracking of cases in the minute books resulted in an unequal number of non-jury cases being

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6 This statement is based on the fact that the 6 courthouses in the study were supposed to have had 360 (that is, approximately 1/2) of the 702 jury trials reported for the period. If the figures from the other courthouses were compiled according to similar standards—and there is every reason to believe that they were—it is reasonable to conclude that the Commission's study reviewed approximately half of the jury trials in the province.

studied.[7] Nevertheless, the cumulative total of 250 cases studied is sufficiently balanced for the purposes of comparison.

Table No. 3
Number of Cases per Region by Trial Type

Region	Judge	Jury	All
Toronto	50	95	145
Durham	5	3	8
York	5	5	10
Peel	18	12	30
Hamilton	22	19	41
Waterloo	10	6	16
ALL	110	140	250

(c) TYPES OF CASES AND PARTIES

Since the working definition of a trial in the Commission's study required only that at least some evidence be heard, both the judge and the jury samples include a number of cases that settled prior to a judgment from the bench or a jury verdict. Table No. 4 below provides a breakdown of the cases sampled by the method by which they were concluded. It should be noted that jury trials ended in settlements more frequently, approximately ten percent more frequently than trials by a judge alone.

Table No. 4
Number of Cases by Trial Type

	Number	Percent
JUDGE	110	
Decided by Judge	87	79.1%
Settled by Judge	23	20.9%
JURY	140	
Decided with Jury	99	70.7
Settled with Jury	41	29.3

The study revealed a more distinct pattern when the cases were analyzed by type.[8] As illustrated in Table No. 5 below, almost all of the matters that were

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7 Of the 250 cases studied in the final sample, 55.8% were jury trials, while the other 44.2% were non-jury trials.

8 Efforts were also made to determine the types of parties that were involved in the cases (that is, whether they were individuals, corporations, or, more specifically, insurance companies), but this ultimately proved not to be possible. While data was obtained from the court files with respect to the identity of the parties, that data did not reflect the practice. For example, in the

heard before a jury were tort claims.[9] This contrasts with the cases heard by a judge alone, of which only 22.7 percent were tort claims. It should be noted that all of the tort claims heard by a judge alone were motor vehicle actions, whereas almost three-quarters (71.5 percent) of the jury trials involved motor vehicle actions. These findings support the commonly held view that civil jury trials deal primarily with motor vehicle personal injury matters.[10]

Table No. 5
Case Type by Trial Type

Case Type	Judge	Jury	All
Tort	22.7%	96.9%	64.9%
Contracts	49.5%	1.5%	22.4%
Other (unknown)	27.8%	1.5%	12.7%

The study also revealed that, in the majority of cases (72.2 percent), jury notices were filed by the defendant.[11] This fact is consistent with the view, reported to the Commission in the consultation process, that juries are requested primarily by insurance companies, who are defending the action on behalf of the insured.

typical motor vehicle case the style of cause ordinarily refers only to two or more individuals. A review of the court files similarly would fail to disclose the involvement of insurance companies in the litigation. However, while insurance companies do not appear to be involved in motor vehicle actions, on the face of the court documents, as a matter of practice they often are involved. Consultation with members of the insurance bar confirmed that insurance companies virtually always retain counsel for the defence in motor vehicle cases, and occasionally retain counsel for the plaintiff's case as well.

9 A more detailed breakdown of the types of cases found in each sample is as follows:

Number of Cases by Case Type and Trial Type

Type of Case	Judge	Jury	All
Motor Vehicle Accident	13	92	105
Tort	7	32	39
Contract	46	1	47
Other	22	2	24
All	88	127	215

10 In the Postscript to the Osgoode Hall Study, *supra,* note 2, at 253, the authors observe that the jury is "frequently used" in automobile cases. While there has always been a sense that the jury hears primarily motor vehicle cases, this was not proven in the Osgoode Hall Study. The findings in the Commission's study provide evidence in support of this long-held view.

11 The jury notices were filed by the plaintiffs in 16.7% of the cases, and by both parties in the remaining 11.1% of cases.

(d) COURT TIME TAKEN IN JURY AND NON-JURY TRIALS

The Commission's study also analyzed the respective length of jury and non-jury trials, in both minutes and days.[12] Minutes were utilized to measure the actual time in court taken to dispose of a case. Table No. 6 sets out the court time, in both minutes and days, taken to dispose of jury and non-jury matters. Both the mean and the median figures are given.[13]

Table No. 6
Time in Court by Type o-f Trial

	Minutes		Days	
Type of Trial	Mean	Median	Mean	Median
Judge	1198	762	4.4	2.8
Decided by Judge	1124	701	4.2	2.6
Settled with Judge	1476	961	5.5	3.6
Jury	1023	820	3.8	3.0
Decided by Jury	1136	905	4.2	3.4
Settled with Jury	741	560	2.7	2.1

The above figures disclose that matters heard by a judge alone take an average of approximately one-half of a day longer of court time for disposition. While this result might be somewhat unexpected, it is important to note the composition of the statistics. When the "Decided by Judge" and "Decided by Jury" cases are compared, the mean or average times are almost identical. A comparison of the "Settled with Judge" and "Settled with Jury" cases, on the other hand, reveals a substantial difference. Cases heard without juries take approximately twice as long to reach a settlement (5.5 days, as compared with 2.7 days for jury trials). The effect that the jury appears to have on facilitating settlements serves to reduce the average of the total jury sample, while the inclusion of longer complex cases within the non-jury category serves to increase its average. Accordingly, while there appears to be no significant difference in the amount of time required to decide jury and non-jury matters, the difference in settlement rates appears to account for the extra half day required, on average, for matters to be disposed of by a judge alone.

While trials by a judge alone take an average of one-half of a day longer than jury trials, a comparison of medians reveals different results. The median jury trial is fifty-eight minutes longer than the median trial by a judge alone. An

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12 For the purposes of the Commission's study, 1 day in court was taken to equal 4.5 hours, which equals 270 minutes.

13 The "mean" is the average time taken. The "median" is the mid-point, that is, the point at which half the cases took more time and half the cases took less.

even greater difference is observed when the medians of "Decided by Judge" and "Decided by Jury" are compared. The median for cases decided by a jury is 204 minutes[14] longer than the median of cases decided by a judge. Interestingly, however, the median for cases settled with a judge is almost double the median for cases settled with a jury, further reinforcing the view that the jury facilitates settlement.

In attempting to understand the disparity between the averages and the medians, it is helpful to review the distribution of the individual samples. Table No. 7, below, sets out the data contained in Table No. 6 in days, and allows for a clearer appreciation of the distribution of the individual samples. An examination of the table reveals that jury trials are considerably more likely to be settled within the first three days of trial than non-jury trials. This distribution explains both the average and the median in respect to settlements. The discrepancy in the decided cases, and its effect on the overall averages and medians, poses somewhat more of an interpretive problem. The difference might be accounted for by the fact that, during the first three days, approximately fifteen percent more cases heard by a judge alone are decided within that period (55.1 percent as opposed to 40.7 percent of jury cases). The mid-point for cases heard by a judge alone would thus arise sooner than for jury cases. However, this does not explain why the median is lower. It is possible, of course, that cases heard by a judge alone dealing with similar disputes take less time than cases heard by a jury. Our study, however, is unable to establish this fact.

Table No. 7
Days[15] in Court by Type of Trial

	JUDGE		JURY		
Days	Decided	Settled	Decided	Settled	All
1 day or less	16.1%	8.7%	7.1%	20.5%	12.6%
2 days	21.8	13.0	17.3	20.5	19.0
3 days	17.2	17.4	16.3	23.1	17.8
4 days	11.5	21.7	14.3	10.3	13.4
5 days	6.9	17.4	13.3	7.7	10.5
6-10 days	19.5	4.3	26.5	17.9	20.6
More than 10 days	6.9	17.4	5.1	0.0	6.1

Further reinforcement for the conclusion that jury and non-jury trials, including settlements, take, on average, approximately the same amount of court

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[14] This represents approximately 3/4 of a court day. See *ibid.*

[15] See *supra,* note 12.

time is obtained by comparing similar kinds of cases. A comparison of motor vehicle trials reveals that those that were heard before a judge alone took an average of approximately one hour longer than those that were heard before a jury.[16] While these statistics are based on a rather small sample (thirteen trials by a judge alone, and ninety-two trials by a jury) the results are still significant, particularly given that discussions with counsel in our consultation process suggested that motor vehicle cases that are heard by juries are no more or less complex than those that are heard by a judge alone. The fact that motor vehicle cases of equivalent complexity take approximately the same amount of time for a judge or a jury to adjudicate suggests that there is no significant difference in the amount of court time required to dispose of a matter by a judge alone or a jury.

While the above data suggest that, on average, jury trials require no more court time to dispose of matters than trials heard by a judge alone,[17] the court's time in empanelling and selecting the jurors must also be considered. In order to assess the amount of court time required to select a civil jury, a survey of Court Service Managers was conducted with the assistance of the Courts Administration division of the Ministry of the Attorney General. The survey responses ranged from thirty to sixty minutes, with the average response being forty-eight minutes. The apparent speed with which civil juries are selected results in no substantial amount of court time being added to the above figures. As a result, even when the time required to select the jury is added to the above averages, there is no significant difference in the court time required to dispose of jury and non-jury matters, when the two complete populations (that is, cases decided and cases settled) are averaged.

It should be emphasized that the data reveal that there is no significant difference in the court time required to dispose of jury and non-jury matters only when the two complete populations are averaged. The statistics do not suggest that a matter would require the same amount of time whether it is tried before a judge or a jury. Indeed, that is almost certainly not the case. The Commission was unable to undertake a study of matched pairs of cases, with a view to demonstrating how much more time, if any, it would take to obtain a decision on the particular facts from a jury rather than a judge. Rather, the study demonstrates that the jury's promotion of settlement has the effect of reducing the average time required to dispose of matters heard by a jury. This results only in the average jury trial requiring less time than the average trial by judge alone. It

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[16] The average time for motor vehicle cases heard before a judge was 1,096 minutes. The average time for motor vehicle cases heard before a jury was 1,035 minutes.

[17] Indeed, the data suggests that a jury trial might require less time to dispose of a matter than a non-jury trial.

does not mean that the jury does not add court time to the adjudication of any given matter, if that matter were to proceed to a verdict.

A final measure that should be considered in connection with court time is elapsed hearing days. Although the means for time in court for cases "Decided by Judge" and cases "Decided by Jury" are virtually identical, there is a substantial difference in the elapsed hearing days of these two groups. While the hearing of the "Decided by Jury" cases required an average of 6.3 days, the "Decided by Judge" cases took an average of 14.2 days. Thus, it took in excess of twice as long, in elapsed time, for cases heard by a judge alone to be decided, even though they involved virtually the same amount of actual court time.

A greater disparity is disclosed when the elapsed hearing days are compared for the total population of non-jury and jury cases. As we noted above, trials heard by a judge alone require about one-half of a court day longer to arrive at a final resolution. In terms of elapsed hearing days, however, trials by a judge alone take in excess of three times as many days to be heard. Trials by a judge alone take an average of 19.7 days, while trials by a jury take an average of 6.1 days. These figures suggest that jury trials are conducted in a more expeditious fashion. The relative speed with which jury trials are completed may contribute to a more efficient use of courtroom time, and a speedier result for the parties.

(e) TOTAL TIME REQUIRED FOR JURY AND NON-JURY MATTERS

While the analysis of the actual time spent in the courtroom reveals no significant difference between jury and non-jury matters, a total time analysis discloses a considerable difference. A review of the number of elapsed calendar days from the filing of a statement of claim through to a final disposition—that is, a settlement, judgment, or verdict—reveals a substantial discrepancy between jury and non-jury cases. Table No. 8 sets out the number of elapsed days, in both mean and median, at the various stages of a claim, as well as the total elapsed days required for a matter's resolution. The data show that matters heard before a judge alone took an average of 1,208 days to proceed from the filing of the initial claim to the final resolution. Matters heard before a jury, on the other hand, took an average of 1,430 days to be concluded, that is, in excess of seven months longer than the average for matters heard by a judge alone.

Table No. 8
Time in Days by Type of Trial

		JUDGE			JURY			
Time Period		Decided	Settled	All	Decided	Settled	All	All
Total	Mean	1133	1504	1208	1382	1548	1430	1341*
	Median	1003	1547	1085	1339	1418	1375	1308
Before Trial	Mean	1080	1461	1157	1376	1533	1422	1314*
	Median	963	1390	1033	1336	1416	1375	1277
Trial	Mean	14.2	41.6	19.7	6.3	5.1	6.0	11.5*
	Median	8.0	8.0	4.0	6.0	3.0	5.0	4.5
Judgment /Verdict	Mean	38.7	--	--	0.6	--	--	14.3*
	Median	3.0	--	--	0.5	--	--	0.6

* $p < .01$ (there is less than a 1 in 100 chance that the results occurred due to chance)

The above data reveal that the difference in averages, referred to above, is a result of the greater amount of time before trial (265 days, or almost nine months) in the jury sample. As we noted above, once a trial starts, juries are over three times as fast in elapsed days at producing a resolution. This difference in time before trial is a product primarily of trial scheduling. In many courthouses throughout the province, because of their infrequency, jury trials are conducted only in special sessions, once or twice a year. In Ottawa, for example, civil jury trials are heard normally in January of each year, although, in urgent cases, jury trials can be included on the ordinary civil list at other times in the year.

Since jury trials require more administrative preparation than cases heard by a judge alone, it is efficient to have them heard together at periodic sittings. Nonetheless, it is not clear that jury trials could not be heard on a more frequent basis than is currently the case. Efforts to bring jury matters to trial sooner would have the effect of shortening the time before trial, and bringing the average total elapsed days of both samples closer together. This would appear to be as much a matter of administrative policy as it is the product of any inherent characteristic of the jury itself.

Interestingly, after the trial, juries required an average of only 0.6 of a day to arrive at their verdicts. Judgments from a judge, on the other hand, required an average of 38.7 days to be released after the trial. It might be suggested, therefore, that one of the benefits of the jury is that the litigants who have their matters heard before a jury receive their result more promptly.

2. THE COST OF CIVIL JURIES

The above time study demonstrates that jury trials, as a group (that is, including those that reach a settlement), do not utilize significantly more court time than matters that are heard before a judge alone. Indeed, it would appear that, on average, jury trials utilize less court time than non-jury trials. Assuming, however, as this study suggests, that there is no significant difference in the amount of time required to dispose of jury and non-jury matters, there are nevertheless additional costs associated with the jury. These costs arise, for example, as a result of the additional administrative burden placed on the court, the additional court time required to empanel the jury, the fees that are required to be paid to jurors, and the need for additional court officers.

In order to estimate the additional administrative costs associated with jury trials, an informal survey of Court Services Managers was conducted at a number of courts in the province, with the assistance of the Courts Administration division of the Ministry. The managers were asked to identify the additional tasks that must be performed in connection with jury trials, and to estimate the costs associated with those tasks.

The first task identified by the Court Services Managers was administrative paperwork. This includes the filing of the jury notice, the preparation of correspondence with potential jurors, the preparation of notices (for example, with respect to the jurors' absences from work), paying bills (for example, restaurant and hotel bills), and paying the jurors' fees. The responses estimated that the additional administrative paperwork requires the labour of three people, for approximately six hours each. The total cost of this task, assuming that the services are performed by administrative personnel in two job classifications, is $364.44.

The next two tasks noted in the responses of the Court Services Managers were empanelling and selecting a jury. The average time to organize a single panel was estimated to be two and one-half hours. This requires the labour of one court services officer. The total cost of this task was thus estimated to be $39.10.[18] With respect to the selection of the jury, the responses estimated that it took from thirty to sixty minutes, with the average time being forty-eight minutes. In order to select a jury, the services of all courtroom personnel are

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[18] It should be noted that a single panel may produce a number of juries. Accordingly, it is not entirely accurate to charge the total cost of empanelling to any single jury. Nevertheless, as a result of the difficulty in apportioning the cost of empanelling a single jury, and the relatively low cost of the total empanelling process, we have included the total empanelling cost in our calculations.

required, including a court clerk, a court reporter, three court services officers, and a General Division judge. The total cost of the services of these individuals for three-quarters of an hour, which is the average time required to select a civil jury, is $305.21.

In addition to the administrative paperwork, referred to above, a variety of other administrative tasks must be performed during the course of a civil jury trial. Responses from the Court Services Managers estimated that these tasks would require the services of two members of the court staff, for a total of slightly less than ten hours. The total cost of these tasks was estimated to be $180.58.

Finally, there are additional costs associated with the jury trial itself. Whereas a trial before a judge alone ordinarily requires the services of one court services officer, jury trials ordinarily require the services of three court services officers.[19] The addition of two court officers, over the course of a trial, can add significantly to the cost of the proceedings. In order to estimate the added cost over the duration of a trial, the average length of a civil jury trial was utilized. The above study of comparative trial lengths[20] revealed that civil jury trials last an average of four days. The cost of an ordinary six-hour day of a court services officer was multiplied by four, and then doubled to represent the fact that two extra officers are needed. The resulting figure, $750.72, represents the greatest additional cost associated with the jury. Of all the estimated costs, this is the most likely to vary in accordance with the length of each trial.

The total of the additional costs, identified above, for a four-day jury trial, is $1651.74. This amount represents the cost of all personnel, including the additional time required of the judge to select the jury;[21] however, it does not include any capital costs, for example, the amortized cost of building facilities for

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19 It is not always the case that 3 court services officers are utilized in civil jury trials. The Toronto court, for example, uses only 2 officers. Nevertheless, the average number of officers reported in the survey was 3.

20 *Supra,* this ch., sec. 1.

21 It might be argued, of course, that the calculation of a judge's "extra" time should not be limited to the amount of time required for selecting a jury, but should include as well the additional time required for a jury trial. According to the judges with whom the Commission consulted, jury trials take approximately 3/4 of a day longer than non-jury trials. However, if we were to add the cost of an additional 3/4 of a court day, we would also have to calculate the costs saved by the jury's apparent ability to avoid or shorten trials through increased settlements. In the result, the Commission determined that it would include only those additional costs that may be clearly identified.

jurors. The total also excludes jurors' fees and expenses, which are negligible in relation to a four day trial.[22]

It is interesting to note that the additional cost of a jury trial estimated by the Commission, of approximately $1,600, corresponds closely with the jury user fees charged in a number of provinces, which are intended to recover the actual additional cost of the jury. As we noted above,[23] the average fee ordinarily required in Alberta is between $1,000 and $2,000. Similarly, court officials in Vancouver estimated the cost of the jury to be $450 per day, which equals $1,800 for a four-day trial.[24] These figures, derived from the practice in other provinces, thus serve to reinforce our conclusion.

Notwithstanding the empirical data obtained by the Commission, we were unable to arrive at a conclusion with respect to the broader issue, that is, whether the abolition of the civil jury would result in significant cost savings. To determine this issue, the resulting savings in administrative expenditures would have to be set off against the present efficiencies resulting from the increased settlement rate induced by the filing of jury notices and the commencement of jury trials. Account would also have to be taken of the rate of appeal from jury verdicts, as opposed to the rate of appeal from decisions of a judge alone, a matter on which we were unable to gain conclusive evidence. Similarly, it would be relevant to determine whether appeals from such verdicts are likely to be more or less costly than appeals from non-jury verdicts. Unfortunately, within the scope of the present study, the Commission was not able to determine these matters. We were unable, therefore, to reach a conclusion as to whether abolition of the civil jury indeed would produce savings for the administration of justice. It seems likely, however, that even if savings were to be achieved, they would not be substantial.

3. CONCLUSIONS

Although it appears to have been accepted by many judges and lawyers that civil jury trials take a greater amount of court time than trials by a judge alone, the empirical data obtained by the Commission demonstrated otherwise. A comparison of the respective medians of cases decided by judges and cases decided by juries discloses that jury trials take in excess of three-quarters of a day

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[22] Jurors' fees are discussed *infra*, ch. 7, sec. 2.

[23] *Supra*, ch. 3, sec. 3.

[24] The officials did note, however, that the cost might vary slightly in different locations in the province.

longer than non-jury trials.[25] However, the averages for these two samples are the same, which suggests that there might not be a basis for the common perception that jury trials take longer on average. More interestingly, when considered as a complete population, inclusive of settlements, the average court time required for jury trials is less than for trials before a judge alone.

While the time required for empanelling the jury, making the opening and closing addresses, and giving the judge's charge to the jury can only add to the length of a trial, this analysis is unduly restricted. A review of the statistics for all jury and non-jury trials studied, including both settled and decided cases, demonstrates that the jury does not have the effect of lengthening trials.[26] Indeed, the average court time required to dispose of jury trials is actually less than the court time required to dispose of non-jury trials. The reason for this result is the apparent effect that juries have on promoting settlements.[27] The ability of the jury to facilitate settlement results in less court time being required to dispose of cases. This saving of court time appears to function in two ways: (1) more cases settle prior to trial; and (2) cases that reach trial settle earlier. Thus, while trying a matter before a judge alone might result in a shorter trial than if the matter were tried before a jury, such an analysis fails to account for the fact that, had a jury been scheduled, the case might not have reached trial as a result of a prior settlement.

With respect to cost, our study suggests that the jury is not as expensive as was previously thought. There are a number of reasons for this conclusion. First, it would appear that there are significantly fewer jury trials actually being conducted in the province than Ministry statistics indicate. Second, as we noted above, there appears to be reason to believe that juries result in the use of less courtroom time, and thereby represent a cost savings. Moreover, there might be additional savings that result from the apparent decrease, in civil jury matters, in the use of judges' time outside the courtroom, and the probability that civil jury matters have a higher rate of settlement, and a lower rate of appeal. However, within the scope of the present report, we were not able to quantify these savings.

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[25] See *supra*, this ch., sec. 1(d), Table No. 6.

[26] See *ibid.*

[27] The view that juries facilitate settlement, demonstrated by the Commission's study and reported by numerous lawyers and judges in the consultation process, is subject to one criticism. Approximately 3/4 of all jury trials involve motor vehicle cases. It might be argued that this type of case lends itself to last minute settlement, and that such settlements might occur even if the jury were abolished. The data obtained by the Commission in connection with this report did not address this possibility. Having noted this reservation, it must be emphasized that the evidence that is available, both empirical and anecdotal, suggests that the jury does play a role in the settlement process.

Finally, when the measurable administrative costs are identified and totalled, the additional cost of the average jury trial is not substantial.[28]

Finally, it should be noted that the empirical data obtained by the Commission suggest that the cost-benefit argument against juries, referred to above,[29] is not as persuasive as was originally believed.

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28 As we noted *supra,* this ch., sec. 1(b), the number of jury trials in Ontario is probably half the number that is reported by the Ministry. Accordingly, it would appear to be reasonable to conclude that there are approximately 350 jury trials annually in the province. When this number is multiplied by $1,600, which is the average additional administrative cost of a jury trial (see *supra,* this ch., sec. 2) the total annual non-capital cost of the jury to taxpayers, exclusive of jury fees and expenses, is $560,000. Of course, this amount does not account for the potential savings in court time that arguably are associated with the jury. As a result, on the basis of the data obtained by the Commission, it is impossible to state definitively that jury trials cost taxpayers more than trials by a judge alone.

29 *Supra,* ch. 4, sec. 3(a).

CHAPTER 7

THE IMPACT OF JURY SERVICE ON JURORS

1. THE CONSCRIPTION ISSUE

One of the aspects of the debate concerning the future of the civil jury that has been neglected is the impact of the jury on the jurors themselves. During the consultation process, it was suggested to the Commission that the impact of jury service on individuals' lives is as an area that would benefit from further research. In particular, one judge, who is located in the Toronto region and is familiar with its inadequate facilities for jurors, emphasized that the treatment of jurors requires substantial improvement. With a view to obtaining better information concerning the impact of jury duty on the lives of individuals who serve as jurors, the Commission determined to conduct a survey of former jurors in civil cases. The purposes of the survey were to ascertain the extent of the impact that civil jury duty can have on the lives of jurors, and to provide an opportunity to those who have served to express their attitudes with respect to the use of the civil jury.

In stating the advantages of the civil jury, advocates of the jury often neglect to consider its complete cost. While the jury might enhance the democratic nature of the trial process, by allowing at least one of the parties to choose their own mode of trial and by involving members of the public in adjudication, it has certain disadvantages as well. Perhaps the most obvious of the jury's negative implications for democracy is the fact that it involves compelling individuals to serve as jurors. The fact that individuals essentially are conscripted to fulfil what has traditionally been considered one of their most basic democratic duties, does not necessarily constitute an abridgment of their democratic rights. Civil society, as has so often been noted, involves obligations as well as entitlements. Nonetheless, the unusual nature of conscripted service in contemporary democratic society requires us to consider whether such a measure is warranted in this instance. It remains to be shown whether the social good achieved by the jury in civil cases is sufficient to justify imposing an obligation of service upon the average citizen. The balancing of the jury's social utility will be dealt with further below. Even if conscription is justified, however, questions remain with respect to the treatment of those who are conscripted.

2. EMPLOYMENT SECURITY AND REMUNERATION

Pursuant to section 41(1) of the *Juries Act,*[1] every employer is required to grant to its employees who are summoned for jury service a leave of absence sufficient for the employees to complete their jury obligations. Upon their return to the workplace, the employees must be reinstated to their former positions, or be provided with work of a comparable nature and value.[2] While this provision protects employees from losing their employment, it provides expressly that the leave may be "with or without pay".[3] Accordingly, the Act protects employment only, not wages.

Section 35(1)(a) of the *Juries Act*[4] provides that jurors are to be paid the fees and allowances prescribed under the *Administration of Justice Act.*[5] Pursuant to the regulations made under that Act, jurors are paid for their service only after the tenth day of service.[6] Section 1 of the regulation provides as follows:[7]

> 1. A juror who attends a sitting of the Ontario Court (General Division) shall be paid a fee of $40 for each day of service after the tenth day of service up to an including the forty-ninth day of service and $100 for each day of service after the forty-ninth day of service.

In addition to the above fees, jurors who do not reside in the city or town in which the trial is held are entitled to receive a travel allowance.[8]

Although the fees and expenses provided for in the regulation are rather modest, they do not differ substantially from those in other provinces, at least after ten days of service.[9] For example, the fee in Prince Edward Island of forty

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[1] R.S.O 1990, c. J.3.

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] R.S.O. 1990, c. A.6.

[6] R.R.O. 1990, Reg. 4, s. 1.

[7] *Ibid.*

[8] *Ibid.*, s. 4, as am. by O. Reg. 497/93, s. 1, and O. Reg. 258/96, s. 1. It should be noted that the latter amendment removed the right of jurors who live in the same city or town in which the trial is held to receive a travel allowance of $2.75.

[9] During the first 10 days of service, Ontario is clearly the least generous province.

dollars per day represents the highest fee paid to civil jurors for every day, or part of a day, served.[10] In Manitoba, jurors are paid twenty dollars for each day that they attend for the purposes of jury selection, and thirty dollars for each day, or part of a day, that they actually serves as a juror.[11] However, under *The Jury Act,*[12] the presiding judge has a discretion, where a trial is "of unusual length" or where "a juror has suffered undue hardship by reason of his attendance at court", to increase the fees paid to jurors.[13] The fees paid to jurors in a number of the other provinces are as follows: fifteen dollars per day in Nova Scotia;[14] twenty-five dollars per day in New Brunswick;[15] and ten dollars per day in Alberta.[16]

In Newfoundland, jurors who are not in receipt of income from wages, self-employment, unemployment insurance or social assistance are paid the provincial minimum wage,[17] which is currently $4.75 per hour. However, that province requires that employers continue to pay the wages of employees required to serve on a jury. Pursuant to section 42(1) of the Newfoundland *Jury Act, 1991,*[18] an employer must pay an employee, who has been summoned to court, "the same wages...and...the same benefits...as that person would have received if he or she had not been summoned or required to attend upon a court or inquiry".[19] Section 42(4) provides, however, that, in the case of a civil jury, where an employer has incurred a cost by continuing to pay the salary and benefits of an employee who has been summoned for jury service, "the presiding judge may make an appropriate order as to those costs".

The Newfoundland legislation requiring employers to continue paying employees who have been conscripted for jury service is unique in Canada.

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10 E.C. 431/92.

11 Man. Reg. 320/87, s. 1(1) and (2).

12 *The Jury Act,* R.S.M. 1987, c. J30.

13 *Ibid.,* s. 42(2).

14 *Juries Act,* R.S.N.S. 1989, c. 242, s. 17(1).

15 N.B. Reg. 90-175, s. 2(1).

16 Alta. Reg. 186/91. Unlike the Ontario provisions, the Alberta regulation also allows jurors to claim for meals purchased.

17 *Jury Act, 1991,* S.N. 1991, c. 16, s. 43(2), and Nfld. Reg. 209/91, s. 6(1).

18 *Supra,* note 17.

19 It should be noted that s. 42(1) applies not only to those who have been summoned for jury service, but also to those whose attendance is required as a witness in a criminal or quasi-criminal matter, and those whose attendance is required at certain inquiries.

While other provinces have yet to introduce such legislation, a number of law reform bodies in the country have considered such provisions. For example, the Law Reform Commission of Saskatchewan, in its *Proposals for Reform of the Jury Act,*[20] recommended that every juror should receive from the province "hourly compensation at the provincial hourly minimum wage".[21] The Commission also stated that "no employee should suffer loss of income for jury service".[22]

In order to achieve its goal, the Saskatchewan Commission recommended that every employer should continue to pay the wages of any employee who is required to serve on a jury.[23] Moreover, the Saskatchewan Commission concluded that jurors who continued to receive their salaries while serving should be required to assign their provincial stipend to their employers.[24] Finally, it should also be noted that the Saskatchewan Commission was of the opinion the legislation should permit persons such as employees of small businesses, and salespersons on commission, to avoid having to serve as jurors.[25]

Shortly after the release of the Saskatchewan report, the Law Reform Commission of Canada released its recommendations concerning the treatment of jurors.[26] The recommendations made by the federal Commission are similar to those of the Saskatchewan Commission. Like the Saskatchewan proposals, the federal Commission recommended "[a] fixed daily remuneration...based on the provincial minimum wage or expressed as a percentage of that sum".[27] The

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20 Law Reform Commission of Saskatchewan, *Proposals for Reform of the Jury Act* (1979).

21 *Ibid.*, at 7.

22 *Ibid.*, at 8.

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 Law Reform Commission of Canada, *The Jury in Criminal Trials,* Working Paper 27 (1980). While the federal Commission's recommendations are made with respect to jurors in criminal cases, the nature of the work and the conditions of service are similar for jurors in both criminal and civil cases. Accordingly, the recommendations of the federal Commission are relevant for the purposes of the present report. It should also be noted that a number of the recommendations made by the federal Commission were made to the provinces, which posses the power, for example, to legislate with respect to the remuneration of jurors. See s. 92(14) of the *Constitution Act, 1867,* 30 &31 Vict., c. 3 (U.K.), which assigns to the provinces exclusive legislative jurisdiction in relation to "[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction".

27 *Supra,* note 26, at 68.

federal Commission also recommended that employers should be required to "continue the wages or salary of every employee during absence for jury service",[28] and that "salaried employees and wage earners called to jury service [should] be obliged to make an assignment of their jury remuneration to employers who continue their wages or salaries".[29] Thus, both the Law Reform Commission of Canada and the Saskatchewan Law Reform Commission were of the view that jurors should to continue to be paid by their employers while serving, and that those who do not receive a salary should be paid an amount based on the provincial minimum wage.

The issue of juror remuneration has been considered more recently by the Law Reform Commission of Nova Scotia, in its 1994 report *Juries in Nova Scotia*.[30] The Commission noted that, in its earlier discussion paper, the Commission had proposed that employers should be required to continue to pay jurors their regular wages.[31] However, "negative public response and further research" led the Commission to change its position in the final report.[32] As a result, the Commission concluded in the final report that the proposal was impractical, and that it could be unfair to some employers.[33]

Notwithstanding the absence of legislation requiring employers to continue paying their employees who serve as jurors, it is worth noting that many employers continue to do so nonetheless, particularly in unionized workplaces. One of the questions asked by the Commission in its survey of former jurors was whether their employers continued to pay their regular salary while they served as jurors. The responses, based on 757 completed questionnaires, showed that 83.9 percent of employed persons continued to receive their full salary while serving as jurors, while 15.6 percent received none of their regular salary. In addition, 0.6 percent received part of their salary while serving. This finding, which suggests that a majority of the employees continue to be paid, corresponds with the findings of similar studies. For example, a national survey of criminal

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28 *Ibid.*

29 *Ibid.*

30 Law Reform Commission of Nova Scotia, *Juries in Nova Scotia* (1994).

31 *Ibid.*, at 40.

32 *Ibid.*

33 *Ibid.* By contrast, a recent report of a joint task force of the American Bar Association and the Brookings Institution recommended "that employers be required to grant paid leave for a limited period—for example, three to five days—to their employees who serve as jurors: *Charting a Future for the Civil Jury System—Report From an American Bar Association/Brookings Symposium* (1992), at 28.

jurors conducted on behalf of the Law Reform Commission of Canada revealed that only a small percentage of jurors did not continue to receive their wages.[34] Of the approximately 500 jurors surveyed, 51.6 percent continued to receive their full pay while serving, while 7.1 percent of the jurors received partial pay, and only 16.4 percent received no pay at all. The other 24.8 percent reported that they had no regular income.[35]

The federal study also revealed a great regional disparity in the way that employers treat employees who are required to attend for jury service. In Edmonton 32.5 percent of jurors reported that the their wages were discontinued while they served, whereas in Toronto, the only Ontario city included in the survey, only 0.1 percent of persons reported not receiving any of their salary while serving.[36] The general conclusion reached in the study—that is, that most jurors continue to receive all or some of their wages while serving—seems to be the case in the United States as well. A national survey of over 3,000 American jurors revealed that approximately eighty percent of those serving on juries did not lose income.[37]

While it appears that a majority of the employed persons who serve on a jury continue to be paid by their employers, this is not determinative of the remuneration issue. The Law Reform Commission of Canada survey also asked jurors their opinion of the fee and other expenses they received for jury service. Of the respondents, 43.7 percent found the remuneration to be "small", while another 18.7 percent found it to be "outrageously small".[38] Only 35.1 percent of the respondents found the fees to be "adequate".[39]

Comments received in response to the study conducted in connection with this report suggest that many of those who serve on juries in Ontario were annoyed, or even insulted, by the remuneration they received. The most common

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34 Doob, "Canadian Juror's View of the Criminal Jury Trial: A Report to the Law Reform Commission of Canada" in *The Law Reform Commission of Canada*[:] *Studies on the Jury* (1979) 29. Although the survey focused on jurors in criminal cases, the kind of trial on which a juror served is irrelevant with respect to the issue of remuneration.

35 *Ibid.*, at 51.

36 *Ibid.*

37 Pabst, Munsterman, and Mount, "The Myth of the Unwilling Juror" (1976), 60 Judicature 164, at 170.

38 *Supra*, note 34, at 52.

39 *Ibid.* It should also be noted that the remaining 2.6% of respondents found the existing jury fees to be "generous". See *ibid.*

complaint on the completed questionnaires received by the Commission was that jurors were underpaid. Many of the respondents to the survey suggested that jurors should receive at least the provincial minimum wage. Others took the position that, due to the poor remuneration and impact on working people's lives, only those receiving unemployment insurance benefits or social assistance benefits ought to serve as jurors. Interestingly, many of the demands for higher juror fees came from individuals who continued to receive their full salary. Those who were fortunate enough to have their employers continue to pay their salaries seemed to have a great deal of sympathy for the less fortunate jurors amongst them.

The responses received by the Commission indicate that any perceived need to improve juror remuneration cannot be addressed completely by requiring employers to continue paying employees while they serve as jurors. A number of persons who serve on a jury are without employment, and compelling them to serve might hamper their job search. As a result, any comprehensive attempt to compensate jurors better should include some form of reasonable minimum payment for those without a source of income. In addition, it should be noted that self-employed persons, who ordinarily have no third party from whom they might continue to receive their income, are required to make the largest sacrifice by serving.

3. SURVEY OF JURORS' EXPERIENCE, CONDITIONS, AND SATISFACTION

In an effort to assess the experience of jurors in civil cases, the Commission surveyed a number of persons who served in Ontario as civil jurors, or who were part of civil jury panels,[40] during the 1994 calendar year. Twenty-one courthouses across the province responded to the Commission's request for lists of persons who had served as civil jurors. On the basis of these lists, 1,482 questionnaires were sent out, of which 536 were sent to persons who served in the Toronto region, in which a large percentage of the province's civil jury trials take place.

The Commission received 757 responses in sufficient time to be included in its tabulations, resulting in a tabulated response rate of 51.8 percent.[41] Of these respondents, 78.7 percent actually served on a jury, while the other 21.3 percent

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40 It should be noted that the list of jurors provided by the Toronto courthouse included only persons who served on a jury.

41 The actual response rate is somewhat higher, as 20 questionnaires were returned for having incorrect addresses and another 18 responses were not received in time to be included in the tabulation.

were involved only in the empanelling process. It was interesting to observe the number of respondents who expressed their appreciation of the fact that the Commission was interested in receiving their views.[42] The comments seem to suggest that many jurors had suggestions or complaints about their experience, but believed that they had no official means by which those suggestions or complaints might be expressed. The questions asked in the survey were designed to provide the Commission with both demographic information and the subjective views of the jurors. It was in response to the request for the jurors' subjective views that many of the suggestions were made.

(a) THE COST OF JURY DUTY

The first question that the jurors were asked related to their employment status. As illustrated in Table No. 1 below, a majority of the jurors, approximately 55.6 percent, were full-time employees, while another 9.2 percent were part-time employees. Thus, 64.8 percent of those who served were employed, either on a full-time or part-time basis. When this statistic is combined with the fact, noted above, that most employees continue to receive their salaries, it appears that at least fifty percent of jurors receive all or part of their wages while they serve. The remaining jurors—approximately one-third of the respondents—was composed primarily of persons who were retired, persons who were self-employed, and parent/homemakers. Of these three categories, as we noted above, it is the self-employed who stand to lose the most through jury service. Self-employed persons, and the 15.6 percent of employed persons who do not receive their salaries, are required to make a considerable sacrifice when they serve as jurors.

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[42] The responses included comments such as "thanks for taking an interest" or "it's nice to see that somebody cares".

Table No. 1
Employment Status

	AREA		
Employment Status	Toronto	Other	All
Self-employed	7.9%	11.2%	9.9%
Full-time	56.6	54.9	55.6
Part-time	7.2	10.5	9.2
Parent/Homemaker	3.8	7.7	6.2
Retired	18.3	11.4	14.1
Student	2.1	1.3	1.6
Unemployed	2.0	2.5	2.3
Two jobs	2.1	0.7	1.2
Percentage of total sample	38.6	61.4	100
Number	290	461	751

Responses received from jurors who were self-employed indicated that three-quarters of them lost income. The average amount reported as lost by those who were self-employed was $996.[43] This figure, of approximately a thousand dollars, is a very a high price to pay for the privilege of assisting in the adjudication of a private dispute. It should also be noted that the 15.6 percent of employed persons who do not receive their normal wages reported that they lost an average of $497.

In addition to lost income, jurors reported incurring expenses in the course of their service.[44] The daily average for expenses reported by jurors was $16.86.[45] The average of the total expenses reported by jurors, for their complete term of service, was $61.55.[46] This figure applies equally to those who continue

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[43] It should be noted that the figures reported by those who were self-employed were often estimates—for example, a real estate agent cannot say for sure how much he or she might have earned in a given week. The figures provided by those who were employed, however, are more likely to be accurate.

[44] The expenses that were most often listed were for parking, meals, transportation, and child care. The largest average expense reported was for meals, while the lowest average expense was for child care, since 92% of all respondents reported no child care expenses.

[45] The daily average for expenses was higher in Toronto at $19.52, as compared to an average of $14.36 at the other court houses. It should also be noted that 78% of all jurors reported average daily expenses of less than $20, which seems to indicate that the daily average applies to most jurors.

[46] Interestingly, the total average figure of $61.55 is lower than the average daily rate of $16.86 multiplied by 5.4 days, which is the average length of a trial as reported by the jurors. This discrepancy might be the result of the fact that jurors might not have sat for 5.4 full days.

to earn their salary while serving and those who do not, but is obviously more of a hardship for the latter.

Jurors who served on a jury reported that their trials lasted an average of 5.4 days. Table No. 2 below illustrates the responses received from jurors who served on a jury, in Toronto and other locations, with respect to the number of days served. The fact that the mean and the median figures are so close to each other further substantiates the fact that the typical jury trial takes about four to five days.

Table No. 2
Days Served on Jury

	Mean	Median	Range
Toronto	4.8	4.0	0-22.5
Other	6.0	5.0	0-25
All	5.4	5.0	0-25

(b) JURORS' EXPERIENCE AND IMPRESSIONS

In addition to obtaining statistical and demographic information, the survey attempted to gauge juror satisfaction. Previous studies have shown that jurors have a great dislike for being required simply to wait in the courthouse. In the Commission's study, those who were summoned for jury duty were asked the percentage of their time at the courthouse that was spent waiting. As can be seen in Table No. 3, 32.8 percent of the respondents spent over half of their time waiting. The table sets out the responses according to whether or not the individuals served on a jury. This reveals that those who did not serve on a jury spent considerably more time waiting. For example, 28.1 percent of those who did serve on a jury, as opposed to 53.9 percent of those who did not serve on a jury, spent over half of their time waiting—a ratio of almost two to one.

Table No. 3
Percentage of Time Spent Waiting

	Served on Jury		
Time Waiting	Yes	No	All
0 - 25%	43.2%	22.4%	39.6%
26 - 50%	28.8%	23.8%	27.7%
51 - 75%	18.1%	24.5%	19.1%
over 75%	10.0%	29.4%	13.7%

The above data demonstrate that the time of those who are summoned for jury duty is used most efficiently once they are selected for a trial. Similarly, the Commission's study confirms, as one would expect, that, as trial length

increases, the percentage of time jurors spend waiting decreases. Table No. 4 demonstrates, for example, that persons who reported spending twenty-five percent or less of their time waiting spent an average of 5.9 days on the jury. On the other hand, those who reported spending over seventy-five percent of their time waiting spent an average of one day on the jury. The disproportionate amount of time spent waiting by those whose service was limited to one day would appear to be the result of the time taken to select the juries, a process that a great number of jurors reported to be most inefficient.

Table No. 4
Time Waiting and Days on Jury

Time Waiting	Mean Days on Jury
0 - 25%	5.9 days
26 - 50%	4.9
51 - 75%	3.1
over 75%	1.0
ALL	4.4

Waiting seems to have the effect of decreasing jurors' enthusiasm for jury service. The data collected by the Commission indicate that the more that jurors are kept waiting, the less sympathetic they are to the preservation of the civil jury. When asked whether the jury should continue to be available for most civil trials, 73.7 percent of those who waited twenty-five percent of their time or less answered affirmatively. On other hand, only 59.8 percent of those who waited seventy-five percent of their time or more answered in the affirmative. The 13.9 percent difference suggests that excessive waiting leads to disenchantment with the jury.

As Table No. 5 below reveals, those who spent twenty-five percent or less of their time waiting were above average in their approval of the jury. Those who waited more than twenty-five percent of their time, however, were below average in their approval of the jury. Those most supportive of continuing the availability of the civil jury appear to be those who have been utilized most efficiently.

Table No. 5
Time Waiting and Approval of the Jury

	Percentage of Time Spent Waiting				
Continue jury trials	0 - 25%	26-50%	51-75%	over 75%	ALL
Yes	73.7%	61.1%	54.8%	59.8%	64.5%
No	20.7%	32.6%	37.3%	35.6%	29.2
Depends	5.6	6.3	7.9	4.6	6.2
ALL	39.6	27.7	19.1	13.7	-

The findings of the Commission's study with respect to the effect of waiting are in accord with the conclusions of other studies. As has been indicated, other research into juror satisfaction reveals that the aspect of the job that jurors most dislike is the waiting. In the Law Reform Commission of Canada's survey of jurors, 51.8 percent of the respondents stated that waiting was the aspect of the job that they disliked the most.[47] While the national figure was 51.8 percent, the percentage of jurors surveyed in Toronto—the only Ontario region included in the study—who identified waiting as the aspect of the job that they disliked the most was considerably higher, at 72.6 percent.[48] The fact that such a high percentage of jurors in Toronto expressed dissatisfaction with waiting is particularly noteworthy since a majority of the civil jury trials in the province are held in Toronto. The current practice at the Toronto courthouse is to keep prospective jurors on hand for a full week before releasing them. Obviously, this practice can result in some individuals being required to wait for a considerable amount of time before possibly being selected for a trial. While this is the practice in Toronto, practices vary throughout the province.

The findings of the federal Commission seem to be in accord with jury studies conducted in the United States. In the American study referred to above,[49] "long periods spent waiting in the jury lounge" was the aspect of the job that respondents most disliked.[50] On the basis of their findings, the authors concluded

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47 *Supra,* note 34, at 54. It should be noted that, at 51.8%, "waiting" was the most common complaint by a substantial margin. By comparison, the next most common complaint, "job neglect", was mentioned in only 7% of the responses.

48 *Ibid.* The higher proportion of Toronto respondents who disliked waiting is probably a result of the fact that 89.2% of respondents reported spending a "moderate" or "large amount" of time waiting. These figures are substantially higher than the figures from any of the other six locations surveyed. See *ibid.*

49 See Pabst, Munsterman, and Mount, *supra*, note 37.

50 *Ibid.,* at 164.

that "[j]urors' favourable reactions [to serving] are diminished not by small fees or loss of income but by the inefficient and wasteful practices of some courts".[51]

In an attempt to assess the impact of service on jurors' views of the jury, jurors were asked for their impression of the jury and jury service both before and after they had served. As Table No. 6 demonstrates, a majority of those surveyed had a favourable view of the jury prior to serving, while only 11.6 percent had an unfavourable view prior to serving.

Table No. 6
Impression of the Jury and Jury Service Before Serving

Favourable	56.1%
Unfavourable	11.6%
No opinion	32.3%

While the Commission's study shows that the citizens of Ontario are generally favourably disposed towards the jury, actual service on the jury seems to increase their approval. A review of Table No. 7, below, indicates that actual involvement with the jury tends to give people an even more favourable impression of it. Of those who had a favourable impression of the jury before serving, 40.2 percent became more favourable, while only 20.2 percent became less favourable—a ratio of approximately two to one. On the other hand, of those who had an unfavourable impression of the jury before serving, 37.2 percent became more favourable, while 34.6 percent became even less favourable. Thus, the ratio of change amongst those whose view of the jury was unfavourable prior to service was approximately one to one. However, perhaps the most significant statistic generated by this comparison is the fact that, of those who had no opinion of the jury before serving, 51.6 percent became more favourable, while only 18.1 percent became less favourable—a ratio of approximately three to one.

The main conclusion that may be drawn from this comparison is that involvement with the jury tends to increase public appreciation of the system. As the statistics demonstrate, those who have no opinion or a favourable impression of the jury prior to service have a strong tendency to become more favourably disposed towards the jury after service. In addition, even those who have an unfavourable impression of the jury prior to service are just as likely to become more favourable after service. This leads to the conclusion that service on the jury makes members of the public even more favourably disposed to the jury than they would be otherwise. This finding is in accord with the conclusions of an

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[51] *Ibid.*

American study of 8,468 jurors in sixteen federal and state jurisdictions, which found that sixty-three percent of the jurors reported having a more favourable attitude to jury duty after serving.[52]

Table No. 7
Impression of the Jury and Jury Service After Serving

	Favourable Before Service	Unfavourable Before Service	No Opinion Before Service	ALL
More Favourable After Service	40.2%	37.2%	51.6%	43.6%
Less Favourable After Service	20.2%	34.6%	18.1%	21.4%
No Change	39.6%	28.2%	30.2%	35.0%

Although a majority of the respondents had a favourable impression of the jury both before and after their service, most still found the experience at least somewhat inconvenient. As can be seen in Table No. 8, below, 43.3 percent of the respondents found their experience with the jury system either "moderately" or "extremely" inconvenient. On the other hand, a majority of the respondents were only "slightly" or "not at all" inconvenienced.[53] The extent of the inconvenience experienced by the respondents appears to have a direct relationship with their views about the future of the civil jury, as will be discussed in greater detail below.[54]

Those who are most likely to have a favourable impression of the jury before service are unemployed persons, students, and retired persons. Those who are most likely to have an unfavourable impression of the jury before service are persons who are employed on a part-time basis.

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52 Munsterman et al., *The Relationship of Juror Fees and Terms of Service to Jury System Performance* (1991), appendix C, citeu in Diamond, "What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors", in Litan (ed.), *Verdict*[:] *Assessing the Civil Jury System* (1993) 282, at 285.

53 The survey did not actually contain a "Not at All" category, as it was assumed that everyone was at least slightly inconvenienced. Nevertheless, 7.9% of the respondents created this fourth category, an apparent testament to the fact that jury duty really does fit into some people's lives (most likely the retired and those employed in the evening).

54 See *infra,* this sec.

Table No. 8
Extent to Which Jurors Were Inconvenienced by Jury Duty

Not at All	7.9%
Slightly	48.8%
Moderately	28.8%
Extremely	14.5%

Finally, those who were involved with jury duty were asked whether they thought that the jury should continue to be available for most civil trials. Given that jurors are compelled to attend, the Commission was interested to learn about their views on the future of the jury. As Table No. 9 discloses, those surveyed approved of the continuation of the civil jury for most actions at a rate of over two to one. Notwithstanding the less than ideal circumstances in which individuals are required to serve as jurors, 64.5 percent of the respondents remained in favour of the continued availability of the jury for most civil actions. Jurors were also asked whether they would request a jury if they were involved in a civil law suit that proceeded to trial. The responses to this question were almost identical to the responses to the question concerning the future of the jury, with 61.6 percent of the respondents stating that they would prefer a judge and jury, thirty percent stating that they would select a judge alone, and 8.4 percent stating that their decision would depend on the particular case.

Table No. 9
Jurors' Views as to Whether Jury Trials Should Continue to be Available

	AREA		
Continue Jury Trials	Toronto	Other	ALL
Yes	59.1%	68.3%	64.5%
No	33.5%	26.3%	29.2%
Depends	7.5%	5.4%	6.2%

Although a majority of the respondents were in favour of continuing the availability of the civil jury, a close relationship exists between approval of the jury and the level of inconvenience experienced by the respondent. As Table No. 10 illustrates, those who were not inconvenienced, or were only slightly inconvenienced, were above average in their approval of the continued availability of juries in civil matters. On the other hand, only 38.7 percent of those who were extremely inconvenienced by the experience were in favour of the continued availability of the civil jury, which is substantially below the average of 64.5 percent. While the correlation between the level of inconvenience experienced by the jurors and their approval of the jury is not surprising, it underscores the need for improvements in the terms and conditions of service.

Table No. 10
Jurors' Views as to Whether Jury Trials Should Continue to be Available and Extent Jurors Inconvenienced

	Extent Inconvenienced				
Continue Jury Trials	Not at All	Slightly	Moderately	Extremely	ALL
Yes	88.7 %	72.0 %	56.9 %	38.7 %	64.6%
No	11.3%	20.7%	37.4%	53.8%	29.2%
Depends	0.0%	7.3%	5.6%	7.5%	6.2%

(c) Jurors' Comments

In addition to the above questions, former jurors were invited to comment on their experiences. The comments ranged from extremely positive,[55] to extremely negative.[56] Generally, however, the responses that included comments contained constructive thoughts on how jury service and the jury system could be improved. While the comments were not tabulated mathematically, certain comments appeared more frequently than others.

The two complaints that were repeated most often were (1) that jurors were not compensated adequately; and (2) that too much time was wasted, particularly during the selection process. The view that jurors deserve better remuneration was advocated by those who continued to receive their salaries, as well as by those who did not. A number of respondents suggested that the provincial minimum wage ought to be the minimum that jurors are paid. This standard, as we noted above,[57] is employed elsewhere in Canada, and was the remedy that was favoured by many of the respondents to deal with the dissatisfaction concerning the adequacy of the remuneration. Other respondents expressed the view that employers should be required to pay the salaries of their employees who are required to serve. A further suggestion was that jurors' expenses should be made deductible for income tax purposes.

A different approach to deal with the inadequate remuneration received by jurors was advanced by a number of respondents. It was suggested, in at least ten responses, that only individuals who receive a pension and unemployed persons should be required to serve on a jury. Such a proposal, of course, would raise considerable problems with the representativeness of the jury.

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55 For example, one juror commented that "[i]t was an honour to participate in a jury verdict".

56 For example, one juror commented that the experience was "a total waste of time".

57 *Supra*, this ch., sec. 2.

In addition to the inadequacy of the remuneration, jurors expressed concern about the selection process, which most perceived to be conducted in an inefficient manner. As noted above,[58] more time is spent waiting by those who do not serve on a jury. One respondent from Toronto informed the Commission that he had been required to wait for an entire week without being selected for a trial. Experiences such as this tend to irritate individuals, who otherwise appear not to mind giving up their own time, if they are able to make a contribution. Being required to attend, and to wait for an extended period of time without being asked to serve, is understandably annoying. A number of respondents reported having to waste the better part of a day before being told that they would not be selected for a jury.

Respondents also expressed their dislike for not being selected to serve on a jury. This is particularly so given the fact that individuals can be required to wait or remain "on call" for jury duty for two weeks or more, depending on the region and, at the end of this prolonged process, might not be given the opportunity to serve.[59] In response to this problem, some American jurisdictions have instituted a "one day-one trial" policy whereby individuals who are not selected for a trial on the first day on which they have been notified to appear are automatically dismissed from further duty.[60] The "one day-one trial" practice has the decided advantage of giving individuals a prompt indication of whether they will be needed and thus allows people to plan their affairs more easily. As well, the practice insures that those individuals who are required to give up more than a day of their time will actually participate in a trial. In effect, the practice manages to deal with two of the most disliked aspects of jury service by reducing waiting substantially and by guaranteeing a trial for those who are required to return. An American study of the civil jury system undertaken jointly by the Brookings Institution and the American Bar Association strongly recommended that courts should follow the "one day-one trial practice".[61]

A number of respondents made a further suggestion concerning the effective use of jurors' time, that is, that the court should sit longer hours each day. Most court sittings begin at 10:00 a.m. and end at 4:30 p.m., including lunch and other breaks. Many jurors reported that they were prepared to work longer days, and

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[58] *Supra*, this ch., sec. 3(b).

[59] Whereas in Toronto the practice is to keep prospective jurors at the courthouse for up to a week before releasing them from jury duty, the Sheriff at Brampton tells all prospective jurors that the selection process takes "at least two weeks". The prospective jurors are not obliged to be at the courthouse for this entire period, although they are required to be available to attend as required.

[60] *Supra*, note 33, at 29.

[61] *Ibid.*

expressed annoyance with the shortness of the court day.[62] Similarly, many jurors reported being frustrated by numerous delays in the presentation of evidence.

In addition to the concerns about the adequacy of the remuneration and the effective use of the their time, the respondents to our survey expressed concerns about courthouse conditions and the way that they were treated by court officials. Court facilities in the province are housed in buildings averaging over fifty years of age. As a result, many of the courthouses in the province are in need of upgraded facilities for jurors.[63] The lack of adequate facilities formed the basis of numerous complaints. A number of respondents complained about the chairs in which they were required to sit. Others expressed the view that more comfortable waiting rooms would alleviate at least some of the discomfort of waiting. Jurors also requested better access to telephones,[64] while a considerable number expressed astonishment that they were not provided with coffee or tea. A smaller number of respondents suggested that meals should also be provided.

The treatment that some jurors received from court officials was also the subject of numerous comments. A number of jurors reported being treated with disrespect by court officers, and in some instances by lawyers and judges. On the other hand, at least as many jurors wrote positively of the treatment received from everyone involved with their trial. Nevertheless, the number of jurors who did complain suggests that measures need to be taken to ensure appropriate treatment of jurors by court officials.

The positive comments and the negative comments received by the Commission were relatively evenly distributed. Many of the critical comments, however, were made by respondents who expressed the view that the civil jury ought to continue to be available. In general, these critical comments were constructive. These respondents offered suggestions to improve an institution that they valued. A smaller number of critical comments were received from individuals whose perception of the jury was unfavourable, and who took the

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[62] One disgruntled respondent stated, "I start my work day at 7:30 and work until 6:00, so I don't see what would be so hard for court to run from 9 to 5".

[63] A number of recommendations to improve the facilities for jurors in the province were made in a relatively recent report to the Courts Administration Management Committee of the Ministry of the Attorney General. The report notes that some courthouses lack proper jury assembly facilities, as well as adequate facilities for parking, food and drink. See Ontario, *Report of the Juries Act Project* (1992), at 20-21.

[64] As one juror explained, "It's bad enough that I have to be away from the office, the least they could do is provide a phone for me to call in at the breaks".

opportunity to recount their experience of inefficiency and express their view that the jury should be abolished.

In general, the Commission's survey disclosed that, after serving on a jury, a considerable majority of former jurors are supportive of the institution. Nevertheless, even supporters admit that there are problems with the treatment of jurors that require attention.

4. CONCLUSIONS

Although some people who serve on juries might not have done so if service was voluntary, after serving, most people look back on the experience favourably.[65] This does not mean that the conditions in which jurors serve could not be improved. Jury service, as has already been described, can make considerable demands on people's time, finances and general well being.[66] Currently in the province there is a regional disparity in the treatment of jurors. While some courts ask prospective jurors to attend at the courthouse every day for a week, others require them to be on call for three weeks or more.

There are a number of other ways in which the experience of jurors might be improved. For example, on a motion to strike a jury notice the impact of a long trial on the lives of the jurors might be considered. This would balance the needs of prospective jurors with the needs of the litigants. Similarly, provisions for improved juror remuneration would mitigate the impact of conscription, and signal to jurors that their contributions are valued. Finally, improving the empanelling process and providing better facilities would demonstrate to jurors that their time and comfort are important concerns. Serving as a juror might be the fulfillment of an important social duty, but individuals ought to be able to fulfil that duty in a more convenient and comfortable fashion than currently appears to be the case.

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[65] See *supra*, notes 37 and 52, at 164 and 285, respectively.

[66] The stress associated with jury service is often overlooked. In Hafemeister and Ventis, "Juror Stress[:] What Burden Have We Placed on Our Juries?" (1993), 56 Tex. B.J. 586, the authors describe the myriad of ailments complained of by jurors, including insomnia, stomach distress, heart palpitations, and depression. While the stress suffered by jurors is often magnified in criminal proceeding, stress plays a role in all situations in which individuals are asked to make a difficult decision that will effect people's lives. See, also, Kelley, *Addressing Juror Stress: A Trial Judge's Perspective* (1994), 43 Drake L. Rev. 97.

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS FOR REFORM

1. GENERAL

As we noted earlier,[1] the Commission made a tentative recommendation in its *Consultation Paper on the Use of Jury Trials in Civil Cases,*[2] that "juries should be available, upon judicial order, only where the predominant issues in the action concern the values, attitudes or priorities of the community and the ends of justice will be best served if the findings of fact or assessment of damages are made by a jury".[3]

The tentative recommendation was based primarily on the assumption that jury trials cost significantly more than trials by a judge alone and, to a lesser extent, on the perception that juries are more unpredictable than judges. Since the publication of the consultation paper, the Commission has had an opportunity to conduct further research into these assumptions. The study of the relative length and cost of civil jury trials, discussed above,[4] demonstrated that, while the administrative cost of a jury trial of average length is approximately $1,600 more than for a trial conducted by a judge alone, this additional cost has to be balanced against the potential savings associated with the jury's apparent effect on settlements, both before and during trial. When account is taken of the tendency of the jury to induce settlements, the overall cost of the jury does not appear to be substantial. Indeed, it is not clear that abolition of the civil jury would produce a net cost savings.

With respect to the second argument made in the consultation paper in support of the tentative recommendation—that is, the purported unpredictability

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1 *Supra,* ch. 5, sec. 1.

2 Ontario Law Reform Commission, *Consultation Paper on the Use of Jury Trials in Civil Cases* (1994).

3 *Ibid.,* at 33.

4 *Supra,* ch. 6.

of the jury—other views received during the consultation process suggested that this is not a sufficient basis for eliminating the civil jury. While a number of lawyers and judges suggested to the Commission that the impact of the jury on settlement rates is a result of its perceived unpredictability,[5] other respondents suggested that judges are equally unpredictable. Still other respondents noted that cases that are truly "predictable" are likely to settle before trial. Accordingly, cases that reach trial are "unpredictable" by definition.

While the debate concerning the question whether juries indeed are unpredictable has many viewpoints, there is little empirical evidence available to resolve the issue. It might be noted, however, that the studies that have attempted to evaluate jury competence have concluded that juries have a strong tendency to arrive at the same conclusions as judges.[6] In light of this conclusion, it is unclear what the factual foundation might be for the perception of jury unpredictability. Given the questions that remain unanswered with respect to the perception that juries are unpredictable, the Commission has concluded that perceived unpredictability is not a compelling argument for restricting the availability of the civil jury.

As a result of the further consultations and empirical research conducted by the Commission, subsequent to the publication of the consultation paper, it would appear that the arguments advanced in support of the Commission's tentative recommendation have lost their persuasive force. However, a further argument against the use of juries in civil cases emerged as a result of the consultation process. The fact that the jury is composed of conscripted individuals, many of whom suffer serious disruptions in their personal and business lives by serving, required further consideration as a possible argument for circumscribing the availability of civil juries.

In order to assess the views of those who have experienced this conscription, the Commission conducted a comprehensive survey of former jurors. As discussed above,[7] the survey revealed that, notwithstanding the hardships that

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5 Judges, who are professional adjudicators, make numerous decisions, many of which are reported or known to the legal community. This enables lawyers to attempt to "predict" the future decisions of individual judges. Juries, on the other hand, are constituted for a limited period, and for a single function. Given the unique composition of every jury, it is impossible to predict their decisions. This inability to predict a jury's verdict, is offered by supporters of the jury as one of its primary virtues, as it is indicative of the fresh non-professional perspective that each jury brings to its adjudicative task.

6 See, for example, Kalven and Zeisel, *The American Jury* (1966), at 58.

7 *Supra*, ch. 7, sec. 3(b).

jury duty can cause, 64.5 percent of those who had been summoned to serve were in favour of the continued availability of jury trials for most civil actions, whereas only 29.2 percent were of the view that civil jury trials should be abolished.[8] Therefore, the survey strongly suggests that, in general, the members of the public that have served as jurors are in favour of maintaining the civil jury. However, former jurors did identify a number of changes that, in their view, would improve the experience of serving.

The further research and consultation conducted by the Commission established that many of the arguments made for abolishing the civil jury were based on assumptions that lack an empirical foundation. Our research suggests that civil jury trials do not cost taxpayers a significant amount, and do not result in increased use of courtroom facilities. Moreover, consultations with judges, lawyers, and jurors indicated that the individuals actually involved in such trials are in favour of their continued existence by an approximate ratio of two to one.

Opponents of the civil jury often assert that juries are not competent to make determinations, particularly with respect to the assessment of damages. Given the lack of data demonstrating that juries are not competent to assess damages, opponents of the civil jury, in our view, have failed to meet the burden of proof necessary for abolishing this institution, which appears to enjoy considerable public support. As a result, the Commission has concluded that the jury should continue to be available in civil cases. Accordingly, the Commission recommends that, subject to the recommendations made below, the present law respecting the availability of the civil jury should not be amended.

While, in the Commission's view, there would appear to be no sufficient justification for further restricting the availability of civil juries, there would appear nevertheless to be room for some improvements. To this end, the Commission makes a number of recommendations, below.

2. JURY USER FEES

As we discussed above,[9] many other provinces in Canada have legislation that requires the party who requests a jury to pay the additional costs associated with it. However, the methods adopted for calculating jury fees vary from province to province. The amount usually required varies from approximately $1,000 to $2,000, depending on the length of the trial and the method of

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[8] The other 6.2% stated that their view would depend on the circumstances and the kind of case.

[9] *Supra*, ch. 3, sec. 3.

calculation. The Commission's study[10] estimated that a four-day jury trial[11] in Ontario would cost an average of approximately $1,600 more than if the matter were heard before a judge alone, assuming the current rate of juror remuneration. Thus, if a jury fee were introduced in Ontario, a party requiring a civil jury would have to pay approximately $1,600, depending on the length of the trial.

While the introduction of a jury fee would help offset the additional administrative costs associated with the jury system, it has certain inherent disadvantages. The most significant problem with implementing a user-pay scheme for the civil jury is that, in some instances, it might act as a financial deterrent that would prevent individuals from having access to the mode of trial of their choice. When added to the high cost of a trial, the introduction of a jury user fee might make the jury too expensive for some litigants. As a result, the Commission recommends that the present law should not be amended to impose a user fee on a party to an action who requires that the action be tried with a jury. This would prevent the ability to pay from interfering with a litigant's right to choose his or her own mode of trial.

3. THE TREATMENT OF JURORS

Although a majority of the individuals who responded to the Commissions' survey of former jurors expressed the view that the jury should continue to be available for most civil actions, the survey also revealed that the remuneration jurors receive, and the conditions under which they serve, require improvement.[12]

The most common complaint expressed to the Commission by former jurors was that the compensation received was inadequate. As we have noted, many Ontarians are required to make a substantial financial sacrifice in order to serve as a juror. Further, while the review of remuneration rates for jurors in other provinces, described above,[13] reveals that jurors generally are not well compensated anywhere in the country, the rate of remuneration in Ontario is considerably below the national average, at least for the first ten days of

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10 Discussed *supra,* ch. 6, sec. 2.

11 Four days is the length of the average jury trial. See the Commission's study of comparative trial lengths, *supra,* ch. 6, sec. 1.

12 The survey is discussed *supra,* ch. 7, sec. 3.

13 *Supra,* ch. 7, sec. 2.

service.[14] The Commission has concluded, therefore, that the fees paid to jurors are lower than is appropriate. At the same time, however, the Commission is mindful of the seriousness of the current fiscal crisis in the province. Accordingly, the Commission recommends that, as soon as the necessary financial resources can be made available, consideration should be given to increasing the fees paid to jurors.

For a number of reasons, however, the Commission is not in a position, at present, to recommend the appropriate rate of compensation. Since any modification of the fees paid to civil jurors would also affect the fees paid to criminal jurors, such a recommendation is beyond the scope of the present report. Determination of the appropriate rate of compensation for jurors would require, among other things, a review of criminal jurors, including a determination of the number of criminal jurors who serve each year, and the average length of their service. Moreover, any reform of juror fees should address a number of related issues. For example, as we discussed above,[15] both the Law Reform Commission of Canada[16] and the Saskatchewan Law Reform Commission[17] recommended not only that all jurors should receive remuneration based on the provincial minimum wage, but also that employers should be required to continue to pay the wages of employees who are required to attend for jury duty, and that employees who continue to receive their salaries while attending for jury duty should be required to assign the remuneration received from the province to their employers. Accordingly, the Commission recommends that, at such time as it might be feasible to consider increased juror compensation, the Ministry of the Attorney General should undertake the necessary studies in order to determine the appropriate rate of compensation that should be paid to jurors generally. The Commission further recommends that any reform of juror fees should address the following related issues: (a) whether employers should be required to continue to pay the wages of employees who are required to attend for jury duty; (b) whether the provincial remuneration should be paid to all jurors, or only to those jurors who would otherwise receive no compensation; and (c) whether employees who continue to receive their salaries while attending for jury duty should be required to assign the remuneration received from the province to their employers. In the interim, the Commission

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[14] Since the average civil jury trial takes only approximately 4 days, most jurors never receive the fee of $40 for each day of service, which applies only after 10 days of service. See R.R.O. 1990, Reg. 4, s. 1, reproduced *supra*, ch. 7, sec. 2.

[15] *Supra*, ch. 7, sec. 2.

[16] Law Reform Commission of Canada, *The Jury in Criminal Trials*, Working Paper 27 (1980), at 68.

[17] Law Reform Commission of Saskatchewan, *Proposals for Reform of the Jury Act* (1979), at 7-8.

recommends that financial hardship should be taken into account more consistently as one of the compassionate circumstances that will excuse a person from jury duty.

Other common complaints received from former jurors concerned the inadequacy of the available facilities and working conditions.[18] In the Commission's view, individuals who are required to attend and participate in the administration of justice deserve to be treated with the utmost of respect, and are entitled to enjoy at least a minimal level of comfort while serving. Accordingly, the Commission recommends that the Ministry of the Attorney General should review the conditions at the courthouses throughout the province and develop provincial standards for those facilities, as well as for the treatment of jurors. These standards should address the concerns expressed by former jurors, including a more efficient method for juror selection and the provision of access to certain amenities, for example, telephones, food and beverages, and comfortable seating.

4. AVAILABILITY OF THE JURY IN ACTIONS INVOLVING THE GOVERNMENT

One of the arguments that is often invoked in favour of retaining the jury for civil matters is that the jury represents a safeguard against the abuse of power by government and, to a lesser extent, by judges. As we noted above in our discussion of this argument,[19] there is little evidence to demonstrate that concerns about impartiality motivate parties to issue a jury notice. However, that might be a result of the fact that juries are not available for actions against the government.

At present, actions against federal, provincial, and municipal governments must be tried without a jury.[20] Litigants in cases involving the government, however, might prefer that their action be decided by members of the community, rather than by an appointee of the government itself. The consultation process undertaken by the Commission revealed that many lawyers

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[18] The complaints received in this respect ranged from the lack of comfortable seating—a particular concern for those who suffer from back problems—to the unavailability of telephones.

[19] *Supra*, ch. 4, sec. 2(a).

[20] Juries are prohibited in actions for "relief against a municipality" by s. 108(2)12 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Section 11 of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, provides that proceedings against the provincial Crown "shall be without a jury". Similarly, with respect to the federal Crown, see the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 26, as en. by S.C. 1990, c. 8, s. 31. The title of the statute was changed by S.C. 1990, c. 8, s. 21.

in the province are in favour of making the jury available for actions involving the government. A number of judges also expressed a positive view of such reform.

It has often been said that it is important that justice not only be done, but that it also be seen to be done. For many members of the public, the possibility of lay participation in actions involving the government may make our legal system seem fairer and thus enhance their respect for the administration of justice. Thus, a reform that would make the jury available for actions involving the government would strengthen the public's respect for the administration of justice, and address any doubts that members of the public might have about impartiality. Moreover, it is difficult to discern a stong policy foundation for subjecting non-government defendants to jury trials, but not the government itself.

The Commission recommends, therefore, that section 108(2)12 of the *Courts of Justice Act,* which prohibits a jury in an action against a municipality, and section 11 of the *Proceedings Against the Crown Act,* which prohibits a jury in an action against the provincial Crown, should be repealed. The Commission further recommends that the Government of Canada should be urged to repeal section 26 of the *Crown Liability and Proceedings Act,* which prohibits a jury in an action against the federal Crown.

5. MOTION TO STRIKE OUT A JURY NOTICE OR DISCHARGE A JURY

As we indicated above,[21] the Commission is of the view that the jury should continue to be available in Ontario for most civil actions. In an effort to preserve the presumption in favour of the availability of the jury, while dealing with some of the criticisms of the civil jury system expressed in the consultation process, the Commission has concluded that certain amendments should be made to rule 47.02 of the Rules of Civil Procedure.[22]

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[21] *Supra,* this ch., sec. 1.

[22] R.R.O. 1990, Reg. 194. Rule 47.02 provides as follows:

> 47.02 (1) A motion may be made to the court to strike out a jury notice on the ground that,
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> (a) statute requires a trial without a jury; or
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> (b) the jury notice was not delivered in accordance with rule 47.01.
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> (2) 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.

Rule 47.02(2) deals with a motion to strike out a jury notice "on the ground that the action ought to be tried without a jury".[23] While the rules do not provide a judge hearing a motion under rule 47.02(2) with criteria for determining the appropriateness of the jury, the jurisprudence suggests that a jury notice may be struck out as being inappropriate, either on the ground of complexity, or on the ground of potential prejudice:[24]

> [A] jury notice may be struck out (prior to trial, at the interlocutory stage) on the ground that jury trial is inappropriate, *i.e.* because the matter is too complex to be handled by a jury...or where, because of the circumstances surrounding the case, prejudice exists which may result in one of the parties being unable to get a fair trial before a jury.

Complexity may arise in a variety of ways. For example, it has been established that a jury notice may be struck out as being inappropriate "on the ground that the action raises issues of fact or law which make the action too complex to be tried by a jury. Similarly, complexity may arise by reason of the form of the action, or the fact that more than one action is being tried."[25] Thus, jury notices have been struck out where the facts or circumstances of the case are found to be too complex for a jury,[26] or "where the evidence is likely to be of a

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> (3) Where an order striking out a jury notice is refused, the refusal does not affect the discretion of the trial judge, in a proper case, to try the action without a jury.

23 It is interesting to note that, although r. 47.02(2) does not provide explicitly that, where an action ought to be tried without a jury the jury notice may be struck out, this would nevertheless appear to be the case. See Watson and Perkins, *Holmested and Watson*[:] *Ontario Civil Procedure* (1993), Vol. 3, 47§14, at 47-24, which states as follows:

> Oddly, neither s. 108 [of the *Courts of Justice Act, supra,* note 20] nor Rule 47 specifically provides, in so many words, for the striking out of a jury notice on the grounds that trial by jury is inappropriate. (Section 108(3) simply provides that on motion the court may order that issues of fact be tried or damages assessed, or both, without a jury, and rule 47.02—which bears the heading 'Where Jury Trial Inappropriate'—requires that 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). However, it is well established by the case law that where a trial by jury is inappropriate, either because of complexity...or possible prejudice...the court may strike out the jury notice, in which case the trial will be by a judge alone.

24 Watson and Perkins, *ibid.*, 47§12[1], at 47-20.

25 *Ibid.*, 47§14[6](a), at 47-27.

26 See, for example, *Whether v. Walters* (1992), 7 C.P.C. (3rd) 197 (Ont. Gen. Div.), in which there were a number of complicating factors. The plaintiff had commenced 4 separate actions arising out of 4 separate automobile accidents, each of which had aggravated the injuries sustained in the previous accidents. The actions were to be tried together or one after the other. In one of the actions there was a crossclaim to determine whether the defendants were insured. There was also likely to be complicated medical and actuarial evidence, and damages would have to be assessed at different dates. See, also, *Irfan v. Loftus* (1987), 22 C.P.C. (2d) 277

technical nature which a jury is likely to have difficulty in comprehending".[27] Jury notices have also been struck out in a number of cases in which difficult questions of law were required to be determined.[28] In *Fulton v. Town of Fort Erie,*[29] Krever J., as he then was, held as follows:[30]

> [B]ecause of recent developments in the law, the more difficult question, which I think is a question of law, is that relating to mental distress. And, where difficult questions of law are required to be determined in a civil action, a jury, in my opinion, is inappropriate. Put another way, the legal question with relation to mental distress is too difficult to make trial by jury an appropriate method of trial.

More recently, however, the Court of Appeal for Ontario has held that the existence of a difficult or unsettled question of law is not in itself a ground for discharging the jury. In *Murray v. Collegiate Sports Ltd.*[31] the court held as follows:[32]

> We are of the opinion...that the trial Judge erred in discharging the jury. In his reasons, he stated that he was motivated by the fact that there were 'serious, difficult and unsettled questions of law as to who should bear the onus in this case.' It was his obligation to resolve the question of onus and put the appropriate question to the jury. If other questions necessarily followed he could put those further questions and if that brought about difficulties, the question of discharging the jury could be reconsidered.

The decision in *Murray v. Collegiate Sports Ltd.* was followed in *Cosford v. Cornwall.*[33] In that case, speaking for the court, Goodman J.A. stated:[34]

(Ont. Dist. Ct.), in which the plaintiff had sustained similar personal injuries in 2 motor vehicle accidents. A jury notice in the second action was struck out on the ground that it would be difficult for the jury to differentiate between and assess the injuries sustained in the 2 accidents. In *Kovacs v. Skelton,* [1966] 1 O.R. 6 (H.C.J) a jury notice was struck out where the case involved trying separate issues of damages involving 8 persons injured in an automobile accident.

27 *Arrow Transit Lines Ltd. v. Tank Truck Transport Ltd.,* [1968] 1 O.R. 154 (H.C.J.), at 155.

28 See *Fulton v. Town of Fort Erie* (1982), 40 O.R. (2d) 235 (H.C.J.), and *MacDougall v. Midland Doherty Ltd.* (1984), 48 O.R. (2d) 603 (H.C.J.). See, also, *Damien v. O'Mulvenny* (1981), 34 O.R. (2d) 448 (H.C.J.).

29 *Supra,* note 28.

30 *Ibid.,* at 237. The decision in *Fulton v. Town of Fort Erie* was followed in *MacDougall v. Midland Doherty Ltd., supra,* note 28.

31 (1989), 40 C.P.C. (2d) 1 (C.A.).

32 *Ibid.,* at 3.

33 (1992), 9 O.R. (3d) 37 (C.A.).

34 *Ibid.,* at 47-48.

> The trial judge did not exercise his discretion in dispensing with the jury on the ground that the nature of the evidence was too complex or technical for a jury to make a proper assessment. On the contrary...he dispensed with the jury on the basis that the law to be applied to the facts as found by them was too difficult to explain to them.
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> In my opinion, he erred in this regard. It was his duty to determine the legal principles to be applied in the case and to instruct the jury with respect to those principles....
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> ....
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> . It is my view that the trial judge erred in law in exercising his discretion to dispense with the jury on the ground that 'I'm doing that because in my judgment, there are issues now involved that aren't properly put to a jury to be decided'. The issues to which he referred were issues of law which it was his duty to decide and the difficulty in deciding such issues did not form a basis for dispensing with the jury. Questions of law are never matters for the jury to decide.

As a result of the decisions in *Murray v. Collegiate Sports Ltd.* and *Cosford v. Cornwall,* there would appear to be very limited scope to strike out a jury notice on the ground of the complexity of the legal issues involved. While the Commission acknowledges that issues of law are decided exclusively by the judge, not the jury, we are nevertheless of the view that there are limited circumstances in which the nature of the legal issues involved should be an acceptable ground upon which to strike out a jury notice. The Commission has concluded, for example, that a jury notice should be struck out as inappropriate where the complex or uncertain nature of the law at issue is such that a jury, properly instructed, would nevertheless find the law difficult to comprehend or apply. Similarly, the Commission is of the view that a jury notice should be struck out as inappropriate where the substantive issues in the case are issues of law and the issues of fact are negligible or are merely incidental, or where the issues of law and fact are inextricably interwoven.

As we noted above, a jury notice may be struck out as being inappropriate not only on the ground of complexity, but also on the ground of potential prejudice. This ground addresses the concern that, as a result of the circumstances surrounding the case, one of the parties might not be able to obtain a fair trial before a jury.[35] Such prejudice might arise, for example, where an action has been the subject of considerable media attention in advance of the trial,

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[35] Watson and Perkins, *supra,* note 23, 47§12[1], at 47-20.

although it would appear that such publicity is no longer an automatic ground for striking out a jury notice.[36]

In addition to the above grounds for striking out a jury notice, the Commission has concluded that a jury notice should be struck out where the judge is of the opinion that jury service would constitute an unwarranted inconvenience to jurors, after considering the nature and importance of the matter or matters at issue, the interests in trial by jury expressed by the parties, and the likely duration of the trial. This would require a judge to strike out a jury notice where he or she is of the opinion, after considering the nature of the case and the inconvenience that jury duty entails for many individuals, that a jury trial is not warranted. This ground is a response, in part, to those former jurors who informed the Commission that they are in favour of the continued availability of the civil jury, but who expressed the view that there should be a threshold that should be met before a jury may be requested.

A number of former jurors and judges, who responded to the Commission's surveys, suggested that there should be a monetary threshold—that is, a minimum amount that must be claimed in an action before a jury may be requested. The Commission concluded, however, that the most appropriate method to deal with the problem of "minor" or "simple" cases being tried with a jury, and thereby inconveniencing individuals unnecessarily, is on a case by case basis. In the Commission's view, civil jurors are entitled to have their interests considered, in addition to those of individuals who request a jury trial. Our recommendation, set out below, addresses this concern.

In view of the conclusions reached above, and in view of the absence of express guidance provided for judges hearing a motion under rule 47.02(2), the Commission has concluded that it would be desirable to clarify the grounds upon which a judge may strike out a jury notice as being inappropriate. Accordingly, the Commission recommends that rule 47.02 of the Rules of Civil Procedure should be amended to provide that a judge hearing a motion under rule 47.02(2) shall strike out a jury notice where the judge is of the opinion that:

1. The trial will likely be so complex that a jury will be unable to discharge its responsibilities adequately, including complexity arising in the following circumstances:

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36 See *Demeter v. Occidental Life Insurance Co. of California* (1979), 23 O.R. (2d) 31 (H.C.J.), aff'd 26 O.R. (2d) 391 (Div. Ct.), where the court concluded, at 33, that "publicity does not automatically warrant a conclusion that a jury cannot be found that will arrive at a fair appreciation of the evidence".

(a) where the facts or circumstances of the case are likely to be too complex for a jury;

(b) where the evidence is likely to be of a technical nature and the a jury is likely to have difficulty in comprehending such evidence;

(c) where the complex or uncertain nature of the law at issue is likely to be such that a jury, properly instructed, would nevertheless find the law difficult to comprehend or apply;

(d) where the substantive issues in the case are issues of law, and the issues of fact are negligible or are merely incidental; or

(e) where the issues of law and fact are inextricably interwoven.

2. Potential prejudice exists, such that it is likely that one of the parties will not be able to obtain a fair trial before a jury.

3. Jury service would constitute an unwarranted inconvenience to jurors, after considering

(a) the nature and importance of the matter or matters at issue;

(b) the interests in trial by jury expressed by the parties; and

(c) the likely duration of the trial.

The grounds upon which a judge may exercise his or her discretion at trial to try an action without a jury include not only those grounds upon which a jury notice may be struck out prior to trial, but also grounds "relating to the conduct of the trial, such as inflammatory advocacy or the putting of improper material before the jury."[37] For the reasons noted above, the Commission has concluded that it would be desirable to clarify the grounds upon which a trial judge may discharge the jury at trial. Accordingly, the Commission recommends that the *Courts of Justice Act* should be amended to provide that a trial judge shall make an order dispensing with the jury under section 108(3) of the Act where the trial judge is of the opinion that:

1. The trial will likely be so complex that the jury will be unable to discharge its responsibilities adequately, including complexity arising in the following circumstances:

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[37] Watson and Perkins, *supra*, note 23, 47§16[1], at 47-36.

(a) where the facts or circumstances of the case are likely to be too complex for a jury;

(b) where the evidence is likely to be of a technical nature and the a jury is likely to have difficulty in comprehending such evidence;

(c) where the complex or uncertain nature of the law at issue is likely to be such that a jury, properly instructed, would nevertheless find the law difficult to comprehend or apply;

(d) where the substantive issues in the case are issues of law, and the issues of fact are negligible or are merely incidental; or

(e) where the issues of law and fact are inextricably interwoven.

2. Potential prejudice exists, such that it is likely that one of the parties will not be able to obtain a fair trial before a jury.

3. Jury service would constitute an unwarranted inconvenience to jurors, after considering

(a) the nature and importance of the matter or matters at issue;

(b) the interests in trial by jury expressed by the parties; and

(c) the likely duration of the trial.

4. There has been inflammatory conduct or improper material has been placed before the jury.

Rule 47.02(3) of the Rules of Civil Procedure provides that "[w]here an order striking out a jury notice is refused, the refusal does not affect the discretion of the trial judge, in a proper case, to try the action without a jury". Section 108(3) of the *Courts of Justice Act*[38] provides that, "[o]n motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury". While rule 47.02(3) suggests that the trial judge has the discretion to discharge the jury in appropriate cases, without reference to the requirement of a motion, it has been held that, pursuant to 108(3) of the *Courts of Justice Act,* the

38 *Supra,* note 20.

discretion may be exercised only upon a motion of one of the parties.[39] The Commission has concluded, however, that the trial judge should have the power to consider and represent the interests of the jurors, who are otherwise unrepresented at the trial, and to dismiss the jury on his or her own initiative where it would be appropriate to do so in order to protect their interests.

Accordingly, the Commission recommends that section 108(3) of the *Courts of Justice Act* should be amended to provide that, where the trial judge is of the opinion that jury service would constitute an unwarranted inconvenience to jurors, after considering (1) the nature and importance of the matter or matters at issue; (2) the interests in trial by jury expressed by the parties; and (3) the likely duration of the trial, the trial judge shall dismiss the jury, and may complete the trial by him or herself, without the necessity of a motion to that effect.

6. CONCLUSION

After conducting extensive consultations with members of the bench, the bar, and the public, as well as a detailed time and cost study, the Commission has concluded that the civil jury does not increase the cost of a trial unduly, and is generally well regarded by those who have had experience with the system. Moreover, it is worth noting once again that our study revealed that there are significantly fewer jury trials conducted in the province than was previously thought to be the case.[40] Even many critics of the civil jury admit that the jury is appropriate in certain cases, citing as examples actions for defamation and actions involving public bodies. It would appear, therefore, that their criticism is not that the jury should be abolished, but rather that there are certain kinds of action for which the civil jury should not be available. As we noted above,[41] the Commission reached the tentative conclusion in the consultation paper[42] that

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39 *Cosford v. Cornwall, supra,* note 33. However, the court left open the possibility that the trial judge might have the right to dismiss the jury on his or her own initiative in certain limited circumstances. The court stated, at 44, as follows:

> If, in a particular case, circumstances relating to illegality, criminality or public policy were involved in the question of retention of the jury, then different considerations might apply to the right of a trial judge to dispense with the jury on his own initiative. No such circumstances exist in the present case and I do not think it appropriate to speculate as to the nature of the circumstances which might justify a trial judge in dispensing with the jury. It may be that even if such circumstances existed, his right would be limited merely to declaring a mistrial.

40 See *supra,* ch. 6, sec. 1(b).

41 *Supra,* this ch., sec. 1.

42 *Supra,* note 2.

"juries should be available, upon judicial order, only where the predominant issues in the action concern the values, attitudes or priorities of the community and the ends of justice will be best served if the findings of fact or assessment of damages are made by a jury".[43] In light of the further consultations and additional research undertaken by the Commission, we have concluded that it is not possible to identify, with any degree of certainty, those cases for which a jury trial is particularly appropriate, and that such a standard, therefore, would be extremely difficult to apply in practice. Accordingly, in this final report, the Commission has sought to identify opportunities for abuse of the right to require a jury under the current law, and has made recommendations directed at preventing such abuse. As we have indicated, it is our view that this objective should be achieved on a case by case basis, in accordance with the recommendations set out in this report.

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[43] *Ibid.*, at 33.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

GENERAL

1. Subject to the recommendations made below, the present law respecting the availability of the civil jury should not be amended.

JURY USER FEES

2. The present law should not be amended to impose a user fee on a party to an action who requires that the action be tried with a jury.

THE TREATMENT OF JURORS

3. (1) As soon as the necessary financial resources can be made available, consideration should be given to increasing the fees paid to jurors.

   (2) At such time as it might be feasible to consider increased juror compensation, the Ministry of the Attorney General should undertake the necessary studies in order to determine the appropriate rate of compensation that should be paid to jurors generally.

   (3) Any reform of juror fees should address the following related issues:

      (a) whether employers should be required to continue to pay the wages of employees who are required to attend for jury duty;

      (b) whether the provincial remuneration should be paid to all jurors, or only to those jurors who would otherwise receive no compensation; and

      (c) whether employees who continue to receive their salaries while attending for jury duty should be required to assign the remuneration received from the province to their employers.

4. Financial hardship should be taken into account more consistently as one of the compassionate circumstances that will excuse a person from jury duty.

5. The Ministry of the Attorney General should review the conditions at the courthouses throughout the province and develop provincial standards for those facilities, as well as for the treatment of jurors.

AVAILABILITY OF THE JURY IN ACTIONS INVOLVING THE GOVERNMENT

6. (1) Section 108(2)12 of the *Courts of Justice Act,* which prohibits a jury in an action against a municipality, should be repealed.

   (2) Section 11 of the *Proceedings Against the Crown Act,* which prohibits a jury in an action against the provincial Crown, should be repealed.

   (3) The Government of Canada should be urged to repeal section 26 of the *Crown Liability and Proceedings Act,* which prohibits a jury in an action against the federal Crown.

MOTION TO STRIKE OUT A JURY NOTICE OR DISCHARGE A JURY

7. Rule 47.02 of the Rules of Civil Procedure should be amended to provide that a judge hearing a motion under rule 47.02(2) shall strike out a jury notice where the judge is of the opinion that:

   1. The trial will likely be so complex that a jury will be unable to discharge its responsibilities adequately, including complexity arising in the following circumstances:

      (a) where the facts or circumstances of the case are likely to be too complex for a jury;

      (b) where the evidence is likely to be of a technical nature and the a jury is likely to have difficulty in comprehending such evidence;

      (c) where the complex or uncertain nature of the law at issue is likely to be such that a jury, properly instructed, would nevertheless find the law difficult to comprehend or apply;

(d) where the substantive issues in the case are issues of law, and the issues of fact are negligible or are merely incidental; or

(e) where the issues of law and fact are inextricably interwoven.

2. Potential prejudice exists, such that it is likely that one of the parties will not be able to obtain a fair trial before a jury.

3. Jury service would constitute an unwarranted inconvenience to jurors, after considering

(a) the nature and importance of the matter or matters at issue;

(b) the interests in trial by jury expressed by the parties; and

(c) the likely duration of the trial.

8. The *Courts of Justice Act* should be amended to provide that a trial judge shall make an order dispensing with the jury under section 108(3) of the Act where the trial judge is of the opinion that:

1. The trial will likely be so complex that the jury will be unable to discharge its responsibilities adequately, including complexity arising in the following circumstances:

(a) where the facts or circumstances of the case are likely to be too complex for a jury;

(b) where the evidence is likely to be of a technical nature and the a jury is likely to have difficulty in comprehending such evidence;

(c) where the complex or uncertain nature of the law at issue is likely to be such that a jury, properly instructed, would nevertheless find the law difficult to comprehend or apply;

(d) where the substantive issues in the case are issues of law, and the issues of fact are negligible or are merely incidental; or

(e) where the issues of law and fact are inextricably interwoven.

2. Potential prejudice exists, such that it is likely that one of the parties will not be able to obtain a fair trial before a jury.

3. Jury service would constitute an unwarranted inconvenience to jurors, after considering

(a) the nature and importance of the matter or matters at issue;

(b) the interests in trial by jury expressed by the parties; and

(c) the likely duration of the trial.

4. There has been inflammatory conduct or improper material has been placed before the jury.

9. Section 108(3) of the *Courts of Justice Act* should be amended to provide that, where the trial judge is of the opinion that jury service would constitute an unwarranted inconvenience to jurors, after considering (1) the nature and importance of the matter or matters at issue; (2) the interests in trial by jury expressed by the parties; and (3) the likely duration of the trial, the trial judge shall dismiss the jury, and may complete the trial by him or herself, without the necessity of a motion to that effect.